

Administrative Justice Project Human Rights Review

*A Background Paper
prepared by
Administrative Justice Project
for the
Attorney General of British Columbia*



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The Administrative Justice Project was established in July 2001 for the purpose of carrying out a comprehensive review of British Columbia's system of administrative justice. The focus of this work has been the more than 50 administrative tribunals that form the core of this part of the province's justice system.

The Project has published a White Paper, On Balance: Guiding Principles for Administrative Justice Reform in British Columbia, and a series of background papers and reports on administrative justice. This publication incorporates the Project's background paper, Human Rights Review, released initially in electronic form in December 2001.

Four of the Project's six background papers have been consolidated for convenience under the title, Administrative Justice Review. These papers include:

Administrative Agencies and the Charter

Reviewing Original Decisions: Guiding Principles and Options

Standard of Review on Judicial Review or Appeal

The Statutory Powers and Procedures of Administrative Tribunals in British Columbia

The sixth background paper, Appointments: A Policy Framework for Administrative Tribunals, has been updated and released, as a report with recommendations, in conjunction with the Project's White Paper.

The other publications of the Administrative Justice Project include a series of reports on the following topics:

Charter Jurisdiction

Dispute Resolution

Independence and Accountability

Making Sound Appointments

Providing Administrative Tribunals with Essential Powers and Procedures

Standing to Appear before Administrative Tribunals

The Terms of Reference for the Administrative Justice Project, the White Paper and all of the background papers and reports are available on the Project's website at www.gov.bc.ca/ajp. Interested readers are invited to contact the Project at ajp@ag.gov.bc.ca.



Human Rights Review

A Background Paper

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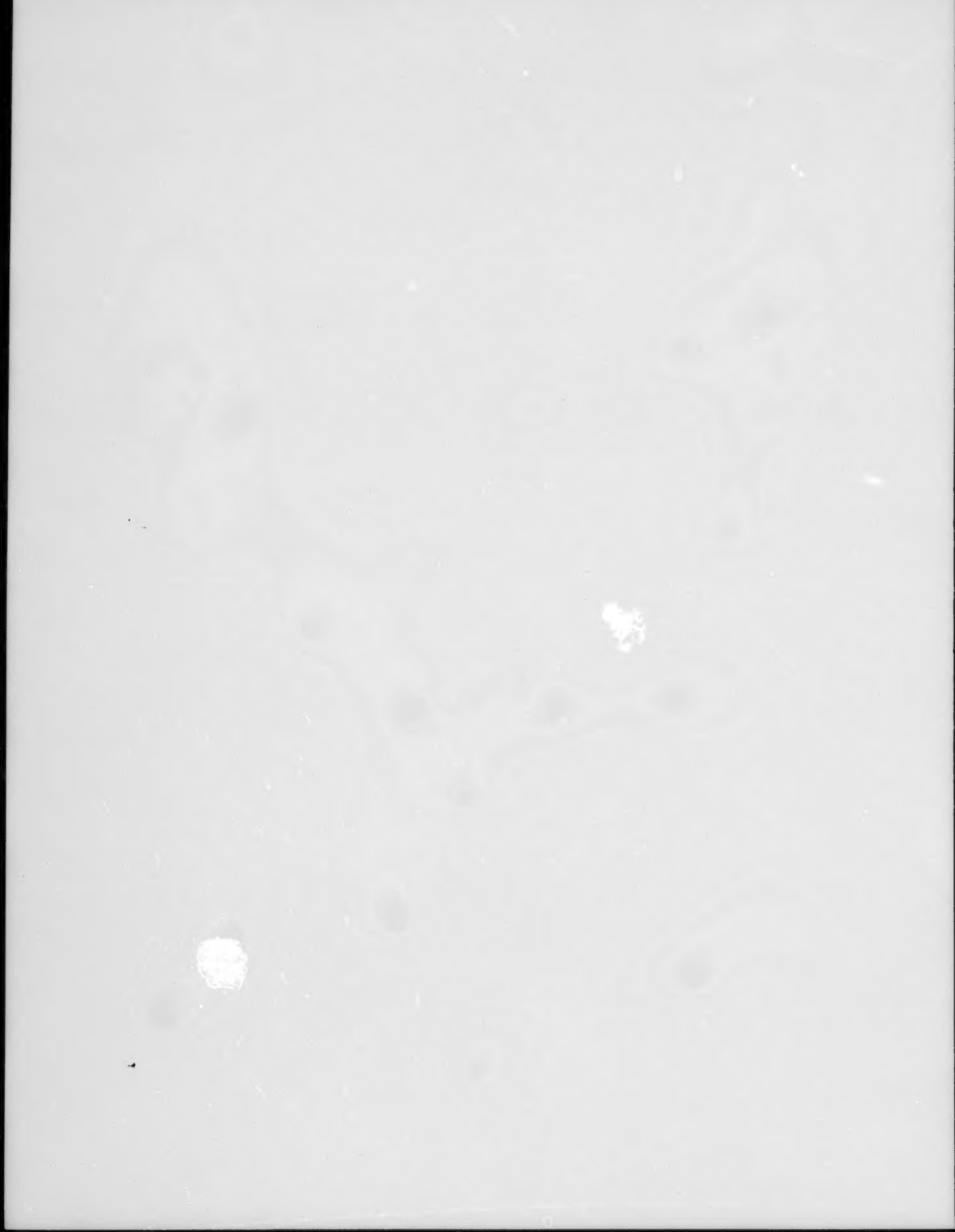
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for

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Ministry of Attorney General

Victoria, British Columbia



Preface

This background paper is one of several to be released as part of the Administrative Justice Project. The project, initiated by the Attorney General, is a broad legal and policy review of the system of administrative justice in British Columbia. Its objectives are to ensure that:

- administrative agencies meet the needs of the people they serve;
- their administrative processes are open and transparent;
- their mandates are modern and relevant;
- government fulfills its obligations by providing the legislative and policy framework administrative agencies require to carry out their independent mandates effectively.

The Terms of Reference for the background papers are to ensure that:

- legislation is based, to the greatest extent possible, on a principled, consistent and clear articulation of the role and powers of administrative agencies;
- administrative agencies possess the procedural authority to respond flexibly, effectively and efficiently to resolve disputes by adjudicative or other means;
- compelling rationales exist for more than one "layer" of administrative appeal or review;
- courts and parties have clearer direction regarding the legislature's intention concerning matters such as the standard of review where a decision is challenged on judicial review or appeals.

The intent of this and the other background papers is to facilitate informed discussion about steps government can take to assist the work of administrative agencies. The papers provide a focus for this discussion and, it is hoped, will result in dialogue and debate within the administrative justice community. Comment will be taken into account by the Administrative Justice Project when it drafts a White Paper for release in early 2002. There will be a further opportunity for public input after the White Paper is released, before government decides on what steps it will take.

If the reader is interested, written comments may be forwarded to the authors at the following address prior to February 15, 2002.

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EXECUTIVE SUMMARY

Human rights have a special, pre-eminent status in our legal system. Human rights legislation is central to the fulfillment of our international human rights obligations and is the instrument by which we seek to prevent discrimination and foster tolerance and equality in our society.

Human rights agencies exist in every Canadian jurisdiction to administer and enforce human rights legislation. They have been established in the belief, informed by experience with early human rights statutes, that administrative bodies can promote human rights in a more accessible, efficient and effective manner than courts. Typically, there exists a commission (the B.C. Human Rights Commission) that has intake, investigation, screening, mediation, advocacy and education roles, and a tribunal (the B.C. Human Rights Tribunal) that has a mainly adjudicative role.

The legal landscape for human rights agencies has changed dramatically with the advent of s. 15 of the *Charter* and the judicial expansion of equality concepts. The result has been an increasing "rights consciousness" in our society. The last twenty years has also yielded correspondingly more public and user dissatisfaction with human rights schemes nation-wide.

Greater awareness has led to more, and more complex, human rights complaints and therefore heavier caseloads. Strict adherence to the rules of procedural fairness has decreased the efficiency and speed of complaint processing. Delays stemming from inadequate resources and time-consuming investigation procedures have generated litigation and fuelled public concern. Complainants perceive that human rights commissions place a higher priority on dismissal statistics than on the proper disposition of complaints. Respondents perceive that commissions are ineffective at eliminating complaints that do not warrant the further expenditure of private or public resources. The multiple roles carried out within commissions have put into question their objectivity in carrying out complaint screening functions. The futility of the investigation process for most complaints is a focus of criticism from all quarters. Human rights advocacy groups and similar organizations believe commissions should be more proactive in their efforts to eliminate discrimination and promote equality through education and other means.

Human rights agencies have struggled to respond to criticism while facing significant and competing financial, legal and policy pressures. They are expected by all to do more with less, and to do it well.

This Human Rights Review background paper outlines the concerns regarding the delivery of human rights services in this province. In order to put those concerns in perspective, this

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background paper reviews the genesis of human rights legislation, its development in this province, the legislative schemes currently in place in other Canadian jurisdictions, and a selection of major reviews undertaken by human rights specialists in the last ten years. This background information reveals that the concerns voiced in this province are not unique to British Columbia. The background paper concludes by offering a summary of seven alternative structural models for consideration in a subsequent phase of the Administrative Justice Project. The alternative models range from the most common Canadian commission structure (with some efficiency variations) to a model that contemplates the transfer of the adjudication of human rights complaints from an administrative tribunal to the court system.

We were asked to refrain from making recommendations. Instead, our task has been to create a foundation for meaningful and informed consultation, debate and fundamental rethinking of the human rights process. We hope that our work fulfills that purpose.

During the preparation of this Background Paper, we received assistance from many people both within and outside government who generously donated their time to provide us with helpful information and commentary. We are grateful to them. We are also grateful to the B.C. Human Rights Tribunal and B.C. Human Rights Commission for their assistance in providing background information concerning their respective operations. We also wish to thank Deirdre Rice for sharing her invaluable insights and human rights expertise with us. We are particularly indebted to Susan E. Ross for her tireless efforts and invaluable and major contributions to this background paper. Finally, we wish to thank Wendi Mackay and Susan Christie for their unwavering and cheerful support and patience.

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CHAPTER I: INTRODUCTION

In August 2001 the Attorney General initiated the Administrative Justice Project for the purpose of conducting a core services review of a number of administrative agencies. The review is intended, in part, to provide an opportunity to "rethink" fundamental assumptions about the statutory mandates, responsibilities, programs and services carried out by various administrative agencies. The objective is to ensure that the most appropriate, accessible, efficient and fair structural and service delivery models and forums are being used and to ensure public programs and services continue to address, among other things, equity and social justice concerns. The core services review requires each administrative agency to:

- examine its core functions, including related programs and services, to ensure that they are relevant to the public interest;
- eliminate overlap and duplication, or provide services at less cost through innovative or alternative delivery models;
- ensure public programs are affordable and sustainable within the province's fiscal framework.

As a separate but related part of the Administrative Justice Project, a number of background papers are to be prepared on various topics, one of which is the Human Rights Review. This part of the project is intended to provide a backdrop, in the context of relevant reviews and legislative initiatives in other jurisdictions, to facilitate a subsequent critical examination and assessment of our human rights legislation.

In this Human Rights Review background paper, we will provide an overview of the development of human rights legislation, review the legislation in this and other Canadian jurisdictions and summarize a number of human rights reviews that have been undertaken since the work of Professor William W. Black (Black) in this jurisdiction in the early 1990s. We will discuss the roles and relationships of the three Commissioners in the Human Rights Commission (HRC), the Human Rights Tribunal (HRT) and the Human Rights Advisory Council (HRAC). We will address institutional delay in the processing of human rights complaints. We will address concurrent or overlapping jurisdiction raised by the adjudication of human rights issues in parallel administrative proceedings or in judicial proceedings, including a discussion of the HRT's ability to decide constitutional questions. We will discuss how the current HRC/HRT structure both advances and impedes the objectives of accessible, efficient and fair process.

Some issues with direct bearing upon the efficiency and effectiveness of the human rights administrative justice system are outside the scope of the Human Rights Review background paper because they are the subject of forthcoming reviews or policy papers by others. The Human Rights Review background paper will serve to inform the work of the Workplace Tribunals Review on the mandate, roles and responsibilities of the HRC and the HRT, and on those areas in human rights where parallel or multiple proceedings arise in a workplace setting. Issues concerning *Human Rights Code* appointments and expertise are critical to a discussion of ways and means to improve service delivery efficiencies and effectiveness. Touched on briefly in this Human Rights Review background paper, these issues will be the subject of specific pan-agency examination in the forthcoming Agency Appointments Policy Paper.

In view of the time constraints associated with the preparation of this Human Rights Review background paper, our ability to seek input from various stakeholders has been limited; however, further public and stakeholder consultation will take place at Phase 2 of the project after interested persons and groups have had an opportunity to review this and other background papers.

CHAPTER II: HUMAN RIGHTS LEGISLATION

Background

Recognition of the centrality of human rights to Canada's international obligations and the primacy of human rights legislation in our domestic legal system is the fundamental starting point for any discussion of human rights law reform.

The critical role of human rights legislation in Canadian society is best understood from an historical perspective. Until the Second World War, there was little attention paid to human rights. The issue of human rights seldom arose in public policy debates or political writings. Discriminatory attitudes and beliefs were pervasive. Discriminatory practices were not confined to the private sphere of social and economic relations but were also reflected in legislation and public policy. Although there were isolated early attempts to address racial and religious discrimination in disparate pieces of legislation early in Canada's history, it was not until the 1940s that the move towards modern human rights legislation gained momentum.

The global struggle against state-sanctioned racism in the Second World War was the primary stimulus for change. Human rights legislation started to develop in the post-war period in the 1940s, largely in response to the concepts introduced into international law that were designed to

prevent the recurrence of the atrocities and human rights violations committed during the war. In the *Universal Declaration of Human Rights* adopted in 1948 and a series of multilateral treaties, sovereign states consented to be bound by the obligation to respect and secure the human rights specified in those documents within their own territories. These instruments provided international standards or norms against which the domestic laws and conduct of member states could be measured as well as minimum standards for respecting basic human dignity and freedom.¹

Before the federal government endorsed United Nations Conventions on Human Rights on behalf of Canada, and most notably the *Universal Declaration of Human Rights*, it obtained the consent of all of the provinces and territories to assume these international obligations. As a country, we made a commitment to protect fundamental human rights. Provincial and federal human rights legislation became the vehicle through which these international human rights obligations were and continue to be fulfilled.²

The first modern human rights legislation in Canada was the Ontario *Racial Discrimination Act* of 1944. This Act prohibited the publication, display or broadcast of anything indicating an intention to discriminate on the basis of "race or creed". This was pioneering legislation although it was very limited in scope. In 1947, Saskatchewan enacted the *Saskatchewan Bill of Rights Act*, which provided for equality rights in addition to fundamental freedoms and political rights. It provided protection against discrimination in employment, housing, land transactions and education.

The early legislation approached discrimination as a crime to be dealt with by the police and the courts. As a consequence, victims were often reluctant to initiate proceedings and cases were difficult to prove. The penal offences ultimately proved ineffective because of the attendant procedural safeguards of a criminal process.

To overcome the weaknesses of this approach, a new enforcement model was adopted in the 1950s and 1960s. The provinces enacted fair accommodation and fair employment practices legislation that provided for enforcement by means of monetary damages rather than penal

¹ The Canadian Human Rights Act Review Panel (the La Forest Panel), in its June 2000 report to the Honourable Anne McLellan, Minister of Justice (the La Forest Report), recommended that the federal Act contain a preamble referring to the various international agreements that Canada has entered into respecting equality and discrimination because it felt it was important that a general link be made "with the international tradition from which our domestic human rights tradition has developed".

² For example, the Twelfth Report of Canada for the *International Convention on the Elimination of All Forms of Racial Discrimination* identified (at p. 11) the *Human Rights Act* as the "main legal instrument for the elimination of racial discrimination in British Columbia".

sanctions. The statutes authorized public officials to assist a complainant by assessing, investigating and mediating complaints. If mediation failed, a board of inquiry could be appointed to hear the complaint and to order a remedy. As Black observed in his 1994 *Report on Human Rights in British Columbia* (1994 Black Report), fair practices legislation also led to an expansion of the grounds of discrimination:

In addition to changing the method of enforcement, these statutes gradually expanded the grounds of discrimination that were covered. In particular, protection was extended to sex and age discrimination, and equal pay acts required that men and women be paid the same wages if they performed the same work. Also, protection was gradually extended from public facilities to areas such as housing, though BC lagged somewhat behind many of the other provinces.³

Ontario was the first province to enact fair employment practices legislation in 1951, followed by Manitoba and the federal government in 1953, Nova Scotia in 1955, and New Brunswick, British Columbia and Saskatchewan in 1956. Ontario enacted fair accommodation practices legislation in 1954 followed by Saskatchewan in 1956, Nova Scotia and New Brunswick in 1959, and Manitoba in 1960. The "fair practices" legislation, which emphasized conciliation and the settlement of complaints, proved to be a considerable improvement over the criminal approach.

Ontario was again at the forefront of change in the 1960s. In 1962, Ontario consolidated its various anti-discrimination provisions into a comprehensive human rights code. It also established the first human rights commission with responsibility for administering a complaint procedure, developing a program of education, advising the government on the future development of the code and generally forwarding the cause of equality rights in the province. Other provinces soon followed suit (Nova Scotia in 1963, Alberta in 1966, New Brunswick in 1967, Prince Edward Island in 1968, Newfoundland in 1969, British Columbia in 1969, Manitoba in 1970, Saskatchewan in 1978, Quebec in 1975 and the federal government in 1977).

The Role of Judicial Interpretation

Since the 1970s, judicial interpretation has played a significant role in the expansion of human rights legislation. There has been a judicial recognition of the fundamental role that human rights legislation performs in our legal system. The Supreme Court of Canada has stressed that human rights legislation is quasi-constitutional in nature in that it may not be altered, amended, or

³³

At pp. 2-3. As Black also notes, a useful review of the development of human rights legislation is provided in Chapter 2 of W. Tarnopolsky and W. Pentney, *Discrimination and the Law* (1985, Richard DeBoo).

repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.⁴

Our highest court has also stressed that the overriding purpose of such legislation is the elimination of discrimination.⁵ Discrimination is not consistent with values underlying the *Charter*; indeed, discrimination has been described as the "antithesis of equality". Thus human rights legislation is to be interpreted in a broad, liberal and purposive manner in order to advance the broad public policy considerations that underlie such legislation. Prohibiting provisions are to be broadly construed and exceptions are to be narrowly construed, in order to ensure that the primary objectives of such legislation are not thwarted.⁶ The Supreme Court of Canada has characterized human rights legislation as giving rise "to individual rights of vital importance, capable of enforcement, in the final analysis, in a court of law".⁷

Human rights legislation provides a complete scheme for the promotion and enforcement of human rights. This legislation forecloses any civil action based directly on a breach of a human rights statute as well as any common law action based on an invocation of the public policy expressed in such legislation.⁸ Since human rights legislation is enacted for the benefit of the community at large, as well as its individual members, it falls within the category of statutes that may not be waived or varied by private contract, including collective agreements. Additionally, if there is an inconsistency between a provision in human rights legislation and any other statute, the former is to prevail.⁹

⁴ See for example, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec Commission des droits de la personne et des droits de la jeunesse v. Boisbriand (City)*, 2000 SCC 17; *C.N.R. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Insurance Corporation of British Columbia and Heerspink*, [1982] 2 S.C.R. 245; *Action Travail des Femmes v. Canadian National Railway Company*, [1987] 1 S.C.R. 1114; *O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Robichaud v. Canadian Human Rights Commission*, [1987] 2 S.C.R. 84.

⁵ *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3 at p. 15 (per Major J.).

⁶ See, for example, *Zurich Insurance Ltd. v. Ontario*, [1992] 2 S.C.R. 321 at 370; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 353 at pp. 585, 601; *Canada v. Mossop*, [1993] 1 S.C.R. 554.

⁷ *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at p. 1134 (per Dickson, C.J.C.).

⁸ *Board of Governors of Seneca College v. Bhaduria*, [1981] 2 S.C.R. 181.

⁹ *Winnipeg School Division*, *supra*; *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202; *Heerspink*, *supra*. Section 4 of the B.C. Code provides that if there is a conflict between the Code and any other Act, the Code prevails.

Courts have also taken particular pains to stress that human rights legislation is remedial, not punitive. It is focused on the protection and elimination of discrimination by providing relief to victims of discrimination. This principle was aptly expressed by Dickson, C.J. in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at p. 917:

It is essential ... to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the Canadian Human Rights Act is very different from the Criminal Code. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

Thus human rights legislation differs in fundamental ways from the criminal law, both in purpose and procedure. While the criminal process carries with it the possibility of conviction and imprisonment, the human rights process is geared towards prevention of discrimination, remedial responses and compensation of the victim.

In the last decade, international standards have been established for the status of human rights institutions vested with responsibility for promoting and protecting human rights. Representatives from national human rights commissions developed a detailed set of standards known as the Paris Principles.¹⁰ These principles were subsequently endorsed by the United Nations Commission on Human Rights and the General Assembly and have become the foundation for international work in this area. The key criteria of the Paris Principles are independence guaranteed by statute or constitution, autonomy from government, pluralism, a broad mandate based on universal human rights standards, adequate powers of investigation and sufficient resources.

British Columbia

Legislative History to 1993

In this province, the legislative history of human rights legislation can be traced back to 1953 when the first prohibition against wage discrimination was passed in the form of an *Act to Ensure Fair Remuneration to Female Employees*, S.B.C. (2d) C-6. This legislation and the subsequent

¹⁰ National Institutions for the Promotion and Protection of Human Rights, GA Res. 48.134, UN GAOR, 48th Sess., 8th Plenary Mtg. UN Doc. A/RES/48/134 (December 20, 1993); National Institutions for the Promotion and Protection of Human Rights, Res. 1994/54, UN HRC 56th Meeting, UN Doc. E/CN.4/RES/1994/54 (March 4, 1994).

development of human rights legislation to the point of introduction of the 1984 *Human Rights Act*, the predecessor legislation to the present Code, was described by Saunders J. in *Vancouver (City) v. Reid*.¹¹

¶29 *The 1953 statute provided for a complaint of discrimination to be referred by the Minister, on the recommendation of the secretary of the Board of Industrial Relations, to an inspector for investigation. The inspector was directed to inquire into the complaint, to endeavour to effect a settlement and to report to the secretary of the Board of Industrial Relations. In the event there was no settlement, the Minister could refer the matter to the Board of Industrial Relations for hearing and recommendations to the Minister, who could then make an order to carry out the recommendations. Thus the process under the 1953 Act was one of complaint, investigation, efforts to settle, and adjudication by an administrative tribunal.*

¶30 *In 1969 the Equal Pay Act and two other statutes prohibiting discrimination were repealed and a large omnibus bill was enacted, the Human Rights Act (An Act for the Promotion and Protection for the Fundamental Rights of the People of British Columbia), S.B.C. 1969, c. 10. The previous wage discrimination provision was continued in section 4. Other forms of employment discrimination were prohibited in section 5*

¶31 *This 1969 statute expressly provided for complaints of wage discrimination (s. 4(1)) and employment discrimination (s. 5) to be made to the director appointed by the Minister of Labour. The director was required to inquire into the complaint and to endeavour to effect a settlement. Failing settlement, the matter could be referred to the Human Rights Commission. The Commission could dismiss the complaint or make an order in accordance with the statute. In the 1969 Act, as in the 1953 Act, the process was one of complaint, investigation, efforts to settle, and adjudication by an administrative tribunal.*

¶32 *In 1973 human rights legislation in British Columbia received a comprehensive revision, emerging as the Human Rights Code, S.B.C. 1973 (2nd Sess.), c. 119*

¶34 *... the Human Rights Code provided for the enforcement of the Act after complaint of discrimination contrary to the Code. The enforcement provisions contained a procedure for investigation and required the director to endeavour to effect a settlement. Thereafter adjudication could follow. The 1973 statute provided a list of remedial orders that could be made, and contained a general six month limitation provision for a complaint to be made and a twelve month limitation on damages.*

¶35 *The next, and last, major revision of the legislation occurred in 1984 ... The 1984 Act continues to prohibit other forms of discrimination, including discrimination in employment, and it continues to provide for enforcement through the procedure of a complaint. Advancement of a complaint under the Act is discretionary. A complaint which is not dismissed is investigated. Efforts are made to settle, and ultimately the complaint may be adjudicated after a hearing*

¹¹ [1996] B.C.J. No. 1381 (S.C.) (Q.L.).

The 1969 Act proscribed discrimination in wages, employment, publication and inquiries, in accommodation, services, or facilities available to the public, "commercial units and self-contained dwelling units", discrimination by trade unions and the publication or display of "any notice, sign, symbol, emblem or other representation indicating discrimination, or an intention to discriminate, against any person or any class of persons for any purpose because of the race, religion, colour, nationality, ancestry, or place of origin of that person or class of persons". It also provided for specific exemptions.

The 1973 Code prohibited discrimination without "reasonable cause" in the following areas: publication or display of any "notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate"; discrimination in the provision of any accommodation, service or facility customarily available to the public; discrimination in the purchase of property; discrimination in tenancy premises; discrimination in wages; discrimination in employment advertisements; discrimination in respect of employment; discrimination by trade unions and employers' and occupational associations. The prohibited grounds of discrimination identified in the statute were: "race, religion, colour, sex, ancestry, place of origin, marital status and age". Additionally, in relation to employment, the Code excluded from the defence of "reasonable cause" "a conviction for a criminal or summary conviction charge ... unless such charge relates to the occupation or employment, or to the intended occupation, employment, advancement, or promotion, of a person".

The 1973 Code also established a human rights commission. The function of the commission, provided for expressly in s. 11(4) of the Code, was "(a) to promote the principles of this Act; (b) to promote an understanding of and compliance with this Act; (c) to develop and conduct educational programmes designed to eliminate discriminatory practices; and (d) to encourage and co-ordinate programmes and activities promoting human rights and fundamental freedoms". The director for the commission was appointed by the minister. The director acted as the chief executive officer of the commission and as registrar "for the purpose of ensuring that complaints are dealt with in accordance with the Act". The director was also given all of the powers of a commissioner appointed under the *Public Inquiries Act*. Human rights complaints were adjudicated by boards of inquiry on referral by the minister in those circumstances where the director was not able to settle an allegation of discrimination (or where she was of the opinion that an allegation would not be settled). The persons entitled to participate as a party to a complaint were described in s. 16(3) as: "(a) the director, commission, or person who made the allegation; (b) the person alleged to have been discriminated against contrary to this Act; (c) the person who is alleged to have contravened this Act; and (d) any other person who, in the opinion of the board of inquiry, would be directly affected by an order made by it". The remedial jurisdiction of boards

of inquiry was dealt with in s. 16. The remedies then available were similar to those provided for in ss. 37(2)(a), (d), and (4) of the existing Code, although the damages in respect of hurt feelings or loss of self-respect could be ordered, to a maximum amount of \$5,000, only if the board of inquiry was of the opinion that "the person who contravened the Act did so knowingly or with a wanton disregard" and "the person discriminated against suffered aggravated damages in respect of his feelings or self-respect". Decisions of boards of inquiry were subject to an appeal to the British Columbia Supreme Court.

The 1984 *Human Rights Act* was enacted "amid considerable controversy" as part of the government's restraint program.¹² Instead of continuing the human rights commission, a new five-person human rights council was created. The council was responsible for the acceptance, screening, investigation, mediation and adjudication of complaints. Following investigation of a complaint, it could submit a report to the minister (in which case the minister could in turn appoint a board of inquiry to adjudicate the merits of the complaint), but this power was never exercised. Instead, when a decision was made to refer a complaint to a hearing, it was conducted by a council member under s. 14(1)(d) of the Act. The remedial powers of the council were comparable to those provided for in the predecessor code.¹³

The 1984 Act was designed to narrow the legislation and restrict enforcement powers. In one report,¹⁴ the legislation was said to "de-emphasize activities designed to eliminate patterns of discrimination" and instead "provide a remedy to identified individuals through an enforcement mechanism that causes the government minimum expense". Previously discrimination "without reasonable cause" had been prohibited, whereas, under the 1984 Act, specific grounds of discrimination were enumerated. Responsibility for carriage of the complaint was transferred from the commission to the complainant. Staff levels were reduced, and the council was required to use the investigative services provided by industrial relations officers employed and managed by the government's Employment Standards Branch. This latter requirement proved to contribute significantly to delay problems associated with the complaint investigation process.

¹² In their text, *Restraining Equality: Human Rights Commissions in Canada*, Howe and Johnson refer (at p. 65) to British Columbia's "turbulent history with respect to its human rights policies and procedures".

¹³ The primary difference between the remedial powers of Boards of Inquiry under section 17 of the 1973 *Human Rights Code* and section 17 of the 1984 *Human Rights Act* related to the discretion to award additional compensation. Under the 1984 statute, the Council could require the person who contravened the Act to "pay to the person discriminated against an amount not exceeding \$2,000". Under the 1973 statute, Boards of Inquiry could order payment of up to \$5,000 if the person who contravened the Code did so "knowingly or with a wanton disregard" and if the person discriminated against suffered aggravated damages in respect of his feelings or self-respect".

Human Rights Review

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While there were miscellaneous human rights amendments between 1984 and 1992, more extensive substantive amendments were enacted in 1992.¹⁵ These amendments expanded the remedial powers of the council to deal with complaints raising allegations of systemic discrimination and made specific provision for the establishment of special programs, including employment equity programs.

1993 and 1994 Black Reports

In 1993, Black was appointed to examine all aspects of the *Human Rights Act* and its place within our legal system. The first phase of Black's work culminated in an extensive internal report on November 15, 1993 entitled *Report Concerning Internal Procedures of the B.C. Council of Human Rights and Related Agencies* (1993 Black Report). The 1993 Black Report is summarized in Appendix A to this Background Paper.

The second phase of Black's work resulted in the 1994 Black report which recommended extensive statutory and administrative reform. Black's broad public consultations revealed uniform criticism of the delay in processing complaints as well as concerns about inequality of access (lack of regional offices), lack of public interest representation in the complaint process, lack of adequate resources (for education, research or policy development) and lack of any educational programs. Additionally, the structure of the human rights council made it difficult, if not impossible, for this body to effectively carry out both an impartial adjudicative function and an educational/public interest function. Finally, the legislative scheme was one that focused on processing individual complaints of discrimination with associated individual remedies. Such an individual complaints based system could not effectively operate to identify and eradicate systemic barriers to equality.

Ultimately Black determined that human rights objectives, structure and resources were the areas most in need of change. The primary objective of human rights legislation should be that of identifying and eradicating systemic discrimination because not only do persistent patterns of discrimination cause the greatest harm to both society and the people affected but they have the greatest potential for an effective remedy:

... a remedy which corrects ongoing patterns of inequality has greater benefits than one that simply provides compensation for past discrimination. Correcting an ongoing policy or practice does more than assist those originally subjected to the discrimination. It prevents future discrimination against others, avoiding harm

¹⁴ William W. Black, Report Concerning Internal Procedures of the B.C. Council of Human Rights and Related Agencies, November 15, 1993.

¹⁵ Human Rights Amendment Act, S.B.C. 1992, c. 43.

before it occurs. It also avoid future human rights cases arising out of the same policy or practice, saving both the government and the parties involved additional expense.

Black identified the secondary objectives of human rights legislation to be redressing harm to individual complainants, preventing discrimination through education and training, and monitoring equality trends and patterns. Additionally, procedural changes would be necessary to speed up the complaints process and substantive changes would be necessary to fill in gaps in the scope of the legislation.

Black also considered the problems associated with the system of providing legal aid funding for human rights complaints, including general lack of legal human rights expertise, low hourly rates and stringent restrictions on recoverable preparation and hearing time. He supported the provision of legal representation for all complainants and for respondents who could not afford a lawyer. Ultimately, he recommended the establishment of a Human Rights Clinic to be administered by the Legal Services Society. Alternatively, he recommended the HRC have responsibility for representing all complainants.

In addition to making recommendations respecting the HRC structure, roles, procedures and mandate, Black made recommendations relating to both education and information programs and the scope of coverage of the substantive and remedial provisions in the Code. The 1994 Black Report is summarized in Appendix B to this Background Paper.

Description of the Current Legislation

The *Human Rights Code*, R.S.B.C. 1996, c. 210, which came into force on January 1, 1997, is largely the product of the 1994 Black Report. Black had proposed a restructuring of the former human rights council, the essential elements of which required separation of the adjudicative function (which now resides with the HRT) from administrative, educational and like functions (which now reside with the HRC and the HRAC). In general terms, the Code is based on but not identical to the model proposed by Black.¹⁶

The purposes of the Code are now expressly provided for in s. 3, in terms that embrace all of the elements that Black saw as being essential to human rights legislation:

- to foster a society in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

¹⁶ 1994 Black Report, pp. 37-39.

- to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- to prevent discrimination prohibited by the Code;
- to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by the Code;
- to provide a means of redress for those persons who are discriminated against contrary to the Code;
- to monitor progress in achieving equality in British Columbia;
- to create mechanisms for providing the information, education and advice necessary to achieve all of these purposes.

The Code applies to all employers and providers of accommodation, services or facilities, including the government. It applies to trade unions, employer associations and occupational organizations, landlords, individuals and corporations. Within the sphere of provincial legislative power, the Code covers discrimination in publications, in the provision of public accommodation, in the provision of public services, in the provision of public facilities, in the purchase of property, in tenancies, in employment advertisements, in wages, in employment and in trade union, employer association or occupational association membership. It applies to any type of retaliatory activity engaged in as a result of a person making a discrimination complaint. These types of prohibited discriminatory practices essentially reflect the prohibited practices in ss. 2 to 9 and 20 of the 1984 *Human Rights Act*.

The Code establishes the HRC which is charged with responsibility for investigating, mediating and dismissing or referring to hearing complaints of discrimination, developing a program of public education and consultation, and promoting compliance with the Code.

The HRC is composed of three members, all order-in-council appointments, with different and, in some cases, overlapping roles. They are the Chief Commissioner of Human Rights (CC), the Deputy Chief Commissioner of Human Rights (DCC), and the Commissioner of Investigation and Mediation (CIM).

The CC is the chief executive officer of the Commission with overall responsibility for the HRC and its staff. The CC is appointed for a five-year term and is eligible for reappointment for one additional term of five years. The CC's role is largely educational and consultative in nature. The CC has specific powers to give effect to the larger social policy objectives of the Code by

developing and conducting a program of public education and information designed to "promote an understanding and acceptance of" the Code, and by submitting special reports to the government regarding human rights in British Columbia.¹⁷

The CC shares with the DCC the mandate to hold public hearings and consultations regarding matters relevant to the Code, and to promote, monitor and assist in the implementation of employment equity and other special programs designed to further the purposes of the Code. Section 42, which deals with special programs, provides in part:

- (2) The chief commissioner or the deputy chief commissioner may
 - (a) make general recommendations concerning desirable objectives for, and
 - (b) on application, give advice and assistance regarding the adoption or carrying out ofemployment equity programs or other special programs or activities that have as their objective the amelioration of conditions of disadvantaged individuals or groups.
- (3) The chief commissioner or the deputy chief commissioner may approve any program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups.
- (4) Any program or activity approved under subsection (3) is deemed not to be in contravention of this Code.¹⁸

The CC and DCC have authority to make general recommendations but have no authority to make binding recommendations on initiatives which would provide certainty to respondents.¹⁹

The CC must, with one exception, supervise and direct the work of the HRC and its staff, and preside at its meetings.²⁰ The exception relates to the exercise of the CIM's powers or duties. The Code directs that neither the CC nor the DCC can direct or interfere "with the exercise of any power granted to or duty imposed on" the CIM.²¹ This provision is designed to ensure that the

¹⁷ See s. 5 of the Code.

¹⁸ There are currently 71 approved special programs around the province: British Columbia Human Rights Commission, *Achievements of the Public Interest Program, Four Year Review*, March 31, 2000.

¹⁹ Thus, if a respondent enters into a settlement with an individual complainant and, as an aspect of that settlement, institutes systemic changes that are designed to prevent further breaches of the Code, the HRC has no authority to provide a guarantee that those changes will not form the basis for a subsequent human rights complaint by another individual.

²⁰ See s. 15(6) of the Code.

²¹ See s. 15(8) of the Code.

CC and DCC operate at arm's length from, and do not interfere in any way with, the CIM's statutory investigation and decision-making powers.²²

The DCC is appointed for a three-year term and is eligible for reappointment for one or more additional terms of five years. The DCC shares some of the responsibilities of the CC for education and consultation, but also has discretion to file a human rights complaint or, alternatively, to require either the CIM or the HRT (as the case may be) to add the DCC as a party to another complaint either before or after it has been referred to the HRT for a hearing.²³ The DCC has no jurisdiction to approve settlements. The Code confers jurisdiction on the DCC, subject to limited exceptions, to enforce HRT orders under s. 39 by filing such orders with the Supreme Court, and to play a role in overseeing implementation of orders under s. 37(3).

The CIM is appointed for a four-year term and is eligible for reappointment for one or more additional terms of five years. The CIM performs a gate-keeping function with responsibility for accepting, screening, investigating and mediating complaints, and either dismissing or referring complaints (or portions thereof) to hearing before the HRT for independent adjudication. The CIM performs a screening function by ensuring that complaints filed with the HRC concern matters governed by the Code. Following acceptance of a complaint, the CIM will investigate and attempt to mediate it. If efforts to mediate prove unsuccessful, the CIM will then go on to consider whether, based on the investigation report, the complaint (or part of it) should be deferred, dismissed without a hearing or referred to hearing by the HRT. The CIM has the ability to delegate his decision-making authority under ss. 25 and 27 of the Code. This decision-making authority is most often delegated to staff members and to persons (often lawyers) who are external to the HRC.

²² In a submission dated December 10, 1999, the B.C. Human Rights Coalition, Vancouver Region, expressed the concern that the structure of the Commission impeded its leadership role. The Coalition observed that "the three Commissioners are independent of one another and take different approaches to their separate mandates. The Chief Commissioner may take a public position on an issue which does not coincide with how the Commissioner of Investigation and Mediation might handle a complaint involving the same issue. There are some mixed messages being conveyed to the public". The Coalition went on to recommend that the Code be amended to provide the Chief Commissioner with the power to oversee all aspects of the Commission's work and stipulate that the three Commissioners endeavour to take a unified approach to human rights enforcement and education.

²³ See ss. 21 and 36 of the Code.

While the Code provides for the reconsideration of CIM screening decisions by the HRT, this provision has never been proclaimed. The CIM has established an internal reconsideration policy for screening decisions.²⁴

The HRT is the quasi-judicial body responsible for adjudicating human rights complaints referred to hearing by the CIM. It consists of at least three full time members (one of whom is the chair) and not more than six part-time members all of whom are appointed by order-in-council for fixed terms.²⁵ One of the HRT's members also functions as a registrar to deal with scheduling and other pre-hearing matters.

Hearings before the HRT are less formal than civil proceedings in Provincial or Supreme Court, but they essentially follow the same model without the full panoply of discovery mechanisms. Section 35 of the Code was amended in July 1999 to empower the HRT to make rules respecting practice and procedure for the conduct of pre-hearing and hearing matters that it sees as necessary to facilitate the just and timely resolution of complaints. The HRT published the first Rules of Practice and Procedure effective November 1, 1999. The 1999 Code amendments included a new provision (s. 38.1) that gives the HRT power to dismiss complaints where a party fails to diligently pursue a complaint. The Rules of Practice and Procedure were amended effective November 1, 2001.

Section 35(2) of the Code provides that the member or panel designated to hear a complaint must give the parties the opportunity to be represented by counsel, to present relevant evidence, to cross examine witnesses and to make submissions. Section 35(3) confers discretion on the member or panel to accept on oath, by affidavit or otherwise, evidence and information that the member or panel considers necessary and appropriate whether or not the evidence or information would be admissible in a court of law. While the Code does not expressly confer power on the HRT to consider questions of law, the legislative scheme confers a broad jurisdiction to deal with all aspects of discrimination complaints referred to hearing and this implicitly encompasses the power to consider most constitutional questions relating to the Code.

Section 37 of the Code confers the following remedial jurisdiction on the HRT:

37(1) If the member or panel designated to hear a complaint determines that the complaint is not justified, the member or panel must dismiss the complaint.

If the member or panel determines that the complaint is justified, the member or panel

²⁴ See *B.C.(H.R.C.) v. B.C. (Human Rights Tribunal)*, [2000] B.C.S.C. 1789 (per Meiklem J.).

²⁵ See s. 31 of the Code.

- (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
- (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,
- (c) may order the person that contravened this Code to do one or both of the following:
 - (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
 - (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups, if
 - (iii) the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and
- (d) If the person discriminated against is a party to the complaint, or is an identifiable member of a group of class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
 - (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;
 - (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
 - (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

(3) An order made under subsection (2) may require the person against whom the order is made to provide the deputy chief commissioner or any other person designated in the order with information respecting the implementation of the order.

(4) The member or panel may award costs against a party to a complaint that, in the opinion of the panel or member, has engaged in improper conduct during the course of the investigation or the hearing of the complaint.

There is no limit on damages for injury to dignity, feelings and self-respect and no provision for awarding punitive or exemplary damages. The ability to order costs is severely limited. The HRT also does not have ongoing jurisdiction with respect to the enforcement of remedial orders and settlements. This has compromised the ability of the DCC to ensure implementation of complex remedial orders and settlements.

Finally, in accordance with Black's 1994 recommendations, s.20 of the Code authorizes the creation of the HRAC as an advisory body to inform the public about the work of the HRC, to ensure that the concerns of the public are brought to the attention of the HRC, and to advise the HRC and the minister on matters relevant to the administration of the Code. In 1998, eleven volunteer members representing various regions and groups within the province were appointed

to the HRAC by order-in-council. Funded through the Agencies, Boards and Commissions Branch of the Ministry of Attorney General, the HRAC holds public and community organization meetings to encourage community feedback on human rights issues in the province. This information is gathered to assist the HRAC in making recommendations to the HRC and the minister.²⁶

Other Canadian Jurisdictions

Although the structure of our HRC is unique, most Canadian jurisdictions have established human rights commissions that perform similar functions. These commissions are generally responsible for promoting an understanding of and compliance with human rights legislation, establishing educational programs and carrying out research designed to facilitate and achieve this objective.²⁷ They also carry out enforcement functions by accepting, investigating, mediating and screening complaints. Some jurisdictions empower the commission to initiate complaints and/or investigations into systemic discrimination. In many jurisdictions, the commission (not the complainant) has carriage of human rights complaints and acts as the complainant's advocate at tribunal hearings.

Some of the human rights adjudicative bodies are *ad hoc* tribunals (generally appointed by the minister responsible for the human rights legislation). Most, like British Columbia, have permanent or standing tribunals.

What follows, for illustrative purposes, is a summary of the federal human rights regime and the regimes in place in Ontario and Quebec. The human rights regimes in the other provinces and territories are summarized in Appendix C to this Background Paper. Given our focus on process, we have concentrated on the structure in place in each jurisdiction to administer human rights legislation rather than on the substantive protection afforded under each of these legislative schemes.

²⁶ To date, the HRAC has published two annual reports and made a number of recommendations for improving the HRC's services to the public.

²⁷ For example, the *Canadian Human Rights Act* requires the federal Commission to carry out its educational mandate by: developing a public understanding of the Act and its principles, sponsoring research; liaising with the Commission's federal counterparts; carrying out human rights studies and reporting recommendations to Parliament; employing means to publicly discourage discriminatory activities; providing advice on affirmative action plans, and approving accessibility plans for the disabled.

Canada

The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, applies to federal government departments and agencies, the governments of the Northwest Territories and Nunavut, federal Crown corporations, and federally-regulated private businesses such as chartered banks, telecommunications and broadcasting organizations, shipping and inter-provincial trucking companies.

The Act establishes the Canadian Human Rights Commission consisting of a chief commissioner, a deputy chief commissioner and between three to six other members appointed by the governor-in-council. Each full-time member may be appointed for a term not exceeding seven years and each part-time member may be appointed for a term not exceeding three years. Members are eligible for re-appointment. The chief commissioner, who is the chief executive officer of the commission, supervises commission staff.

The commission is charged with administration of the Act, and investigating and referring complaints to hearing. It also has broad powers in relation to the promotion of the principles of the Act, which include developing and conducting information programs to foster public understanding, undertaking and sponsoring research programs, and maintaining a close liaison with similar bodies in the provinces.

The complaint mechanism resides with the commission. Any person or group of persons having reasonable grounds for believing that a person is engaging in a discriminatory practice may file a complaint. The commission also has authority to initiate a complaint where it has reasonable grounds for believing that a person is engaging in a discriminatory practice. The commission must deal with the complaint except under any of the following conditions:

- the alleged victim has not exhausted grievance or review procedures otherwise available;
- the complaint is one that could more appropriately be dealt with according to a procedure provided for under another Act;
- the complaint is beyond the jurisdiction of the commission;
- the complaint is trivial, frivolous, vexatious or made in bad faith;
- the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the commission considers appropriate, before the receipt of the complaint.

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The commission has discretion to designate an investigator. The investigator must submit a report as soon as possible after the conclusion of the investigation. Following investigation, the commission must refer the complaint to the appropriate authority if it is satisfied that the complainant ought to exhaust grievance or review procedures or that the complaint could more appropriately be dealt with by means of another procedure.

The commission may request the chair of the tribunal to institute an inquiry into the complaint if it is satisfied that an inquiry is warranted in all the circumstances and there are no grounds for dismissing the complaint. The commission also has discretion to appoint a conciliator for the purposes of attempting to bring about a settlement of the complaint.

The tribunal is composed of a maximum of fifteen members including a chair and vice-chair appointed by the governor-in-council. Persons appointed as members of the tribunal must have experience, expertise and interest in, and sensitivity to, human rights. The chair and vice-chair must also be members in good standing of a provincial bar for at least ten years. The chair may make, and has made, rules of procedure governing the practice and procedure before the tribunal.

Where the commission requests the chair of the tribunal to institute an inquiry, a member of the tribunal is assigned to the complaint. The commission generally has carriage of the complaint in the tribunal inquiry and must adopt "such position as, in its opinion, is in the public interest having regard to the nature of the complaint". At the conclusion of the hearing, the tribunal may dismiss the complaint or order that the respondent:

- cease the discriminatory practice and take measures, in consultation with the commission, to redress the practice or prevent the same or a similar practice from occurring in the future;
- make available the rights, opportunities or privileges that were denied to the victim;
- compensate the victim for any or all of the wages lost and expenses incurred;
- compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation;
- compensate the victim by an amount not exceeding \$20,000.00 for pain and suffering.

The tribunal may also order special compensation if the respondent has engaged in the discriminatory practice in a willful or reckless manner.

Ontario

The Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, establishes the Ontario Human Rights Commission composed of not fewer than seven members appointed by the lieutenant-governor-in-council. The Cabinet designates one member as chair and one member as vice-chair. The commission is charged with responsibility for, amongst other things, promoting equality, developing and conducting programs of public information and education, taking appropriate action to eliminate sources of tension based upon prohibited grounds of discrimination, and enforcing the Code. The commission is composed of three branches: (a) mediation/investigation board; (b) policy and education branch; and (c) legal branch.

Any person may file a complaint. The commission also has authority to initiate its own complaint or to initiate a complaint at the request of any person. The Code directs the commission to investigate complaints and "endeavour to effect a settlement"²⁸. The commission has authority to decline to deal with a complaint under any of the following conditions:

- the complaint could or should more appropriately be dealt with under another Act;
- the subject matter is trivial, frivolous, vexatious or made in bad faith;
- the complaint is outside the jurisdiction of the commission;
- the facts upon which the complaint is based occurred more than six months prior to the filing of the complaint unless there is good faith and no prejudice arising.

The Ontario Code establishes a board of inquiry to adjudicate complaints that are referred to hearing. Members of the board of inquiry are appointed by the lieutenant-governor-in-council. Where the commission does not effect a settlement of the complaint and it appears that "the procedure is appropriate and the evidence warrants an inquiry", it may refer the complaint to the board of inquiry for hearing. There is a reconsideration power where the commission declines to refer the complaint for hearing.

The board of inquiry must hold a hearing within thirty days after the date of referral of the complaint. The commission has carriage of the complaint before the board of inquiry. The board of inquiry must make a decision within thirty days after the conclusion of its hearing²⁹. It has broad remedial powers to dismiss a complaint or to direct a party to do anything that, in the

²⁸ The parties are first invited to participate in voluntary mediation before investigation. Approximately 60% of complaints are referred to early mediation. Of those, approximately 70 to 75% are resolved within three to six months. This appears to be a highly effective program.

²⁹ This has been interpreted as directory as opposed to mandatory.

opinion of the board, the party ought to do to achieve compliance with the Code and to order restitution including an award not exceeding \$10,000 for mental anguish. Where, upon dismissing a complaint, the board of inquiry finds that the complaint was trivial, frivolous, vexatious or made in bad faith or undue hardship was caused to the person complained against, it may order the commission to pay such costs to the respondent as are fixed by the board. An appeal lies from the decision of a board of inquiry to the Ontario Divisional Court.

Quebec

The Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, establishes the Commission des droits de la personne et des droits de la jeunesse, which is mandated to ensure the principles set forth in the Quebec *Charter* respecting fundamental freedoms, political rights, judicial rights and economic and social rights are upheld. The commission is also responsible for the administration of the Act respecting equal access to employment in public bodies.

The commission is composed of fifteen members including a president and two vice-presidents. The members of the commission are appointed by the National Assembly on the motion of the Quebec Prime Minister or terms not exceeding ten years. Seven members of the commission must be chosen from among persons capable of making a notable contribution to the examination and resolution of problems relating to human rights and freedoms. Seven members must be chosen from among persons capable of making a notable contribution to the examination and resolution of problems relating to the protection of young persons' rights.

The president is responsible for administration and management of the affairs of the commission. The commission is, amongst other things, charged with responsibility for:

- conducting a non-adversarial investigation on its own initiative or following receipt of a complaint about any situation;
- fostering settlements;
- developing and conducting programs of public information and education;
- directing and encouraging research and publications.

Any person or group may file a complaint with the commission. The commission must seek evidence to determine whether it is expedient to foster the negotiation of a settlement between the parties, to propose the submission of the dispute to arbitration, or to refer any issue to the tribunal. The Quebec *Charter* provides that the commission may cease to act where "it believes it would be futile to seek further evidence or where the evidence collected is insufficient".

If the dispute cannot be settled, the commission must propose arbitration to the parties. It may also propose, taking into account the public interest and the interest of the victim, any measure of redress, such as the admission of the violation of the right, the cessation of the act complained of, the performance of any act or the payment of compensation or punitive damages.

Where the parties will not agree to negotiation or arbitration of the dispute, the commission may, where consistent with the public interest, apply to the human rights tribunal to obtain an appropriate measure against the respondent or to demand a measure of redress for the victim. Where the commission declines to submit an application to the tribunal, the complainant may, at his or her own expense, submit an application directly to the tribunal to pursue such remedy.

The tribunal is composed of at least seven members appointed by the provincial government. The president is chosen, after consultation with the Chief Judge of the Court of Quebec, from among the judges of that Court who have notable experience and expertise in, sensitivity to and interest for matters of human rights and freedoms. The tribunal has jurisdiction to hear and dispose of any application for a remedy by the commission under ss. 80, 81 or 82, applications submitted in respect of affirmative action programs, and applications concerning equal access to employment in public bodies.

A complaint to the tribunal must be in writing. The plaintiff must file a factum within fifteen days of the filing of an application; other parties have thirty days to file a factum in response. The tribunal must issue a written decision and has discretion to order costs against parties who appear in the proceedings. Any final decision of the tribunal may be appealed to the Court of Appeal with leave.

Non-Canadian Jurisdictions

In the United States, the federal Equal Employment Opportunity Commissioner (EEOC) has an exclusive jurisdiction to enforce provisions in a number of anti-discrimination statutes including the *Civil Rights Act of 1964* (Title VII), *Equal Pay Act of 1963*, *Employment Act of 1967* (age discrimination provisions) and the *American with Disabilities Act of 1990* (Title 1). Collectively, these laws prohibit discrimination based on race, colour, national origin, sex, religion, disability and age. However, the EEOC does not have exclusive jurisdiction over rights enforcement:

Unlike the CHRC, the EEOC does not have a monopoly on rights enforcement. Individuals may sue in court for violation of most human rights laws. In most cases they must first exhaust their administrative remedies. Also unlike the Canadian model, there are different procedures in the private and public sectors.

Complaints brought against the federal government are not investigated by the EEOC. The respondent does the investigation, an administrative law judge (an ALJ, for which there is no Canadian equivalent) hears the complaint, and appeals from the judge's decision are filed with the EEOC.³⁰

The EEOC federal public sector employment process has the following features:

- every federal agency has an official responsible for implementing anti-discrimination law;
- agencies must make alternate dispute resolution processes available as quickly as possible;
- employees must elect their remedial forum (i.e., grievance procedure or human rights process).

The commencement of action in more than one forum does not result in the suspension of one pending the outcome of the other ('the "clock" does not stop ticking in other forums').³¹

In the private sector, individuals may elect to use the EEOC administrative process or sue in court. A complaint must generally first be filed with the EEOC as a condition precedent to the commencement of an action. When the EEOC elects not to pursue a complaint, it issues a 'right to sue' and the individual may proceed with an action in court. There are a number of advantages to this process:

- the advantage to some individuals of having a right to file court actions in discrimination complaints and have a jury trial;
- the 'right to sue' notice, which may be issued by the EEOC after a preliminary investigation of a complaint, takes the pressure off the commission to investigate every complaint thoroughly;
- the focus on addressing widespread patterns and practices of discrimination as opposed to individual complaints. This focus is evidenced in the Priority Charging Procedure, which is a management strategy designed to use enforcement resources effectively. It mandates the identification of important complaints that will advance the broader public interest in eliminating discrimination. Complaints that would likely "go nowhere", or consume disproportionate resources, are rejected;

³⁰ Donna Greschner, *The Complaint Process in Other Countries: Any Lessons for Canada?* This paper was commissioned by the Canadian Human Rights Review Panel as part of its 2000 review of the federal human rights legislation. The summary (referred to in this Review) is found at <http://www.chrrreview.org/pubs/>.

³¹ *Ibid*, p. 2.

- the widespread use of mediation.³²

Both Great Britain and Northern Ireland have human rights commissions. These commissions do not investigate or "screen" complaints (i.e., decide whether or not a complaint should be adjudicated). If they choose to, they will provide assistance and/or legal representation to complainants. Also:

... Every person has the right to file actions in discrimination cases; for employment complaints the tribunal is a specialized employment one, while for other types of discrimination, actions are typically filed in court. No one has the right to have a commission provide them with free legal representation or other types of advice. Each commission receives applications for aid and selects those cases that meet its priorities, such as those that may eliminate systemic practices. The commissions are not gatekeepers, but advocates.³³

In the United States, Great Britain and Northern Island, therefore, individuals who have been discriminated against may have their claims adjudicated by a court. In Canada, there is no tort of discrimination and thus, independent of statutory authority, no right to sue. An individual's fundamental right not to be discriminated against only exists because of human rights legislation that provides the sole means for vindication of that right.³⁴

CHAPTER III: OTHER CANADIAN JURISDICTIONS SINCE 1992

There have been a number of human rights reviews in Canada in recent years. We have focused on selected reviews that are intended to be representative of the work that has been carried out in the human rights area in Canada since 1992. In this chapter, we will focus on provincial reports published in Alberta, Ontario and Nova Scotia and the *Report of Legal Representation Models under the British Columbia Human Rights Code* (the 1998 Black/Thomson Legal Representation Report). We will also discuss the 1998 Auditor General Report and the 2000 La Forest Report, both of which examine the operations of the federal commission and tribunal.

We will also refer to a recent book entitled *Restraining Equality – Human Rights Commissions in Canada*, which examines the paradox that has emerged between increasing rights consciousness and national and provincial human rights systems in crisis. The authors provide some interesting and controversial insights concerning the impact of financial restraint on equality rights and the current difficulties faced by human rights commissions across Canada.

³² *Ibid*, pp. 2-3.

³³ *Ibid*, p. 3

³⁴ *Board of Governors of Seneca College v. Bhaduria*, [1981] 2 S.C.R. 181 at p. 195.

The federal and provincial human rights reviews that have been conducted in this country over the last decade represent a collective wealth of information concerning both deficiencies in various statutory models and proposals for reform. These reviews reveal problems that appear to be endemic in every human rights scheme regardless of the enforcement structure. The selected reviews summarized below provide a useful context for examining the statutory scheme in this province.

Reviews

Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Cornish Report) (Ontario, 1992)

In December 1991, the Ontario government announced the creation of an independent task force to be chaired by Mary Cornish to: (a) review the procedures for the enforcement of human rights under the *Human Rights Code, 1981*; and (b) make recommendations for a fair and practical system for enforcement of human rights. The mandate of the task force was limited to procedural reform and did not address substantive coverage under the Act. Such coverage was to be the focus of a later review.

The review was initiated because of widespread criticism from many quarters concerning the human rights process and the belief that reform of the human rights enforcement system was long overdue. The task force sought input from a variety of sources including government, various stakeholder groups including human rights advocacy groups and business and labour groups, the legal profession and members of the public. The task force was assisted by an advisory committee composed of twelve persons from across the province who had an interest in human rights. The review process culminated in the Cornish Report, submitted to the minister on June 30, 1992.

The task force proposed a system based upon four cornerstones for achieving equality: (a) a consumer perspective presenting consumers of the system with options on how best to deal with a human rights claim; (b) a community-driven focus empowering the regions of Ontario and communities to play a major role in ensuring a strong and responsive human rights system; (c) a proactive approach to promoting equality to ensure compliance without having to file tribunal claims; and (d) an effective but accessible claim resolution process.

In formulating the proposed system, the task force adopted the following guiding principles for its work:

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- the system should be geared to promote equality and overcome discrimination for disempowered groups;
- the system should be capable of achieving significant results to overcome systemic discrimination;
- the system should be timely, accessible, equitable, effective and empowering to persons and groups who experience discrimination;
- the system should incorporate a focus on discrimination faced by groups and a procedure that makes enforcement accessible to them;
- the system should be accountable to people who experience discrimination. Regular monitoring and accountability mechanisms should be built into the system;
- the system should fairly consider the legitimate interests of those responsible for ensuring equality;
- the system should assist equality seeking groups to develop resources, expertise, and confidence to claim their rights;
- claimants should have control over their cases;
- the system should provide quick access to a hearing;
- the system should have remedies which are monitored and enforced;
- the system should provide options and assistance to the claimant to deal effectively with the many different kinds of discrimination;
- resources should be provided to assist people in obtaining their rights under the Code;
- the independence, expertise, credibility, representativeness and effectiveness of any agency should be ensured;
- the system should be based on and promote the indivisibility of human rights and solidarity and unified, strategic planning and leadership;
- the system should be coordinated with other existing or planned equity agencies but must also preserve the guarantees set out in the Code (i.e., the Code must have primacy over all other legislation).

The new human rights enforcement system proposed by the task force was to be composed of a twelve-member independent, community-based Equality Services Board (ESB) to assist people with human rights claims, a revitalized human rights commission (Human Rights Ontario or HRO)

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to play a strategic, proactive role to overcome systemic discrimination, and an Equality Rights Tribunal (ERT) to provide timely access to trained, full-time human rights adjudicators.

The task force envisaged that the ESB would establish centers around the province where claimants could obtain information about the Code and assistance with filing a complaint. It was also contemplated that the ESB would fund existing community advocacy organizations to do intake and/or represent claimants or to bring test cases before the ERT.

The task force proposed that the HRO would have no control over the screening of human rights complaints. Claimants would be able to obtain community-based assistance at equality rights centres and have their claim resolved or taken to a hearing according to their wishes. The task force proposed that the HRO would promote equality on a broad scale by taking key system cases forward and by carrying out other proactive initiatives. It would have a chief commissioner and five full-time commissioners with specific mandates in the areas of policy and research, proactive systemic initiatives, compliance services, education and advocacy services.

The task force contemplated that the ERT would be a permanent body providing access and prompt decisions to consumers who were unable to resolve their complaints by alternate means and to the HRO on systemic cases. It was proposed that the chair of the ERT would be responsible for overseeing its functioning and administration. The task force also proposed that there would be a registrar, a director of resource and training and four associate chairs responsible for employment equity, pay equity, human rights and mediation respectively. Finally, the task force proposed that there would be a panel of adjudicators, known as vice-chairs, from which the registrar and associate chairs would assign adjudicators to claims.

In proposing this new structure, the task force emphasized the importance of ensuring the independence of the new system to regain public confidence and trust. It proposed the establishment of an equality rights appointments committee to recommend names of qualified people to fill key senior positions to enhance the independence of these bodies. The task force also foresaw strong community involvement in the development, monitoring, and evaluation of these bodies as a key part of ensuring the system's independence and effectiveness.

Equal in Dignity and Rights – a Review of Human Rights in Alberta by the Alberta Human Rights Review Panel (O'Neill Report) (Alberta, 1994)

In December 1993, the Alberta government appointed a panel chaired by J.S. O'Neill, the chief commissioner of the Alberta Human Rights Commission, to conduct a public review of its human rights legislation, the *Individual's Rights Protection Act* (IRPA). This was the first review of the

legislation since the enactment of the IRPA in 1973. The panel was mandated to consider the scope of the IRPA, the fairness of the human rights process and the cost-effectiveness of the commission.

The report was completed in June 1994. The panel engaged in extensive public consultation culminating in a series of recommendations concerning both substantive and procedural aspects of the IRPA. The "overwhelming majority" of submissions received from the public called for the government to maintain and strengthen the IRPA and the commission.

The report contained a number of recommendations concerning independence, accessibility, administration and grounds of discrimination. The panel recommended that the commission report to the legislature rather than a government department to ensure independence. The panel expressed considerable concern regarding the complaint processing system and the inability of the commission to keep up with the number of new complaints. It recommended an increase in funding to the commission's budget to provide for increased staffing.

The panel also recommended the replacement of boards of inquiry with a standing human rights tribunal composed of at least five qualified persons to adjudicate complaints. The panel felt that a standing tribunal would eliminate the cost and time spent on educating board members and expedite the adjudication process. It recommended that the chief commissioner and members of the commission be selected by an all-party legislative committee and stressed the importance of selecting commissioners with a good understanding of human rights.

The panel also emphasized the importance of the commission's educational mandate and made recommendations concerning the establishment of strategic partnerships with boards of education, social agencies and human rights groups to produce and deliver educational programs on various human rights issues. The panel also recommended the implementation of a "volunteer program" to train people in the delivery of public education programs and services.

The panel recommended that the name of the IRPA be changed to the *Human Rights Act* to more accurately reflect the true intent of the legislation. It also recommended an amendment to the preamble to give recognition to the *Charter* and other international and domestic obligations, an amendment to broaden the retaliation provision, and an amendment to enable the commission to initiate its own complaints of discrimination. The panel also made a number of substantive recommendations with respect to the grounds of discrimination.

Report on Legal Representation Models Under the British Columbia Human Rights Code (Black/Thomson Legal Representation Report) (B.C., 1998)

The Black/Thomson Legal Representation Report followed up on earlier work done by Black in 1993 and 1994. In 1997, the HRC initiated a consultation process to solicit views from stakeholder organizations and others regarding the most effective way to provide legal representation for human rights hearings. The HRC looked at the inadequacies that were identified by the 1994 Black Report and sought public input on three options for the future provision of legal services:

- continue with the arrangement with Legal Services Society (provision of legal services to all complainants at the hearing stage to all complainants and to respondents on a means basis);
- provide funding to qualified public interest advocacy groups so that independent community advocacy services could be established;
- rely on representation by staff lawyers who report to the DCC.

A consultation paper entitled *Options for the Provision of Commission-Funded Legal Representation under the Human Rights Code* was released in February 1997. The HRC received a number of submissions in response and met with stakeholders to discuss the consultation paper. This further consultation process culminated in the Black/Thomson Legal Representation Report. Since there was a consensus that complainants should not be represented by DCC legal staff, the Black/Thomson Legal Representation Report focused on three options:

- the existing tariff system administered by the Legal Services Society;
- a clinical model in which all representation would be through a specialized legal clinic;
- a mixed model combining a tariff system and some form of clinic.

Black and Thomson examined the existing system (including research done on clinical models) and concluded³⁵ that the system was inadequate for the following reasons:

... clients who do not have the means to pay for a lawyer at the on-set of a complaint have a long delay before legal assistance of any kind is available. Further, the current tariff makes it difficult for lawyers to specialize in human rights and to develop the expertise in the field of human rights. The quality of

³⁵ At p. 9 of the Report.

legal representation is inconsistent, and those lawyers who do provide excellent representation often do so for altruistic reasons, despite the sacrifice involved.

The number of human rights complaints has increased steadily since the inception of the human rights tariff.³⁶ However, the yearly budget has not changed significantly in the last few years. The pressure on the system is clear. The quality of the resulting service is a common concern of all stakeholders.

Although the research data do not conclusively prove the merits of alternative models, the level of dissatisfaction with the current legal assistant model calls for the consideration of alternatives such as the clinical model or a mixed model of delivery of legal services. If the existing model is retained, the consensus is that it would have to be significantly modified.

The authors also observed that there was "considerable support for the use of some form of specialized clinic, either alone or in conjunction with a tariff plan to pay other counsel".

The Black/Thomson Legal Representation Report then explored the advantages and disadvantages of the identified models³⁷ as well as the approximate costs of implementing each

³⁶ The tariff was established in 1985. The *Legal Representation Report* notes that in 1991/1992, 878 complaints were filed with the Human Rights Council. Of these, 25 progressed to a hearing. At the time the Report was written, the projected number of complaints for 1997/98 was 1250, with 854 expected to proceed to investigation and 55 of these expected to proceed to a hearing.

³⁷ The "pros" and "cons" for the three options identified in the Report are these. (1) Private bar or tariff model: (a) pros are legal representation throughout the province by local lawyers; client have a choice of counsel; complainants are provided legal representation regardless of their financial circumstances thus ensuring that the Code provides a remedy for discrimination; legal representation can be made available to both parties without any danger of creating a conflict of interest; and (b) cons are no legal representation or legal assistance prior to the matter being set for hearing (complainants and impecunious respondents are often misrepresented at crucial stages of a complaint such as the negotiation of a settlement); lack of legal representation or assistance until the hearing has been set may increase the cost of legal representation by prolonging cases that could have been resolved earlier; often the respondent has the benefit of legal representation from the onset of the complaint while the complainant has had to deal with the matter on his/her own; the tariff rate is low and the allowable tariff hours are not commensurate with the realities of a human rights case (lawyers cannot sustain a human rights practice); complainants often have no way to know whether a particular lawyer has human rights expertise and have difficulty in getting an appropriate referral; to adequately represent a client, lawyers often provide service beyond the allowable hours of the tariff (disincentive for lawyer to take on human rights cases); no room in current budget for tariff increase or hour increase under tariff; model makes it difficult to use lower cost paralegals; if model extended to earlier stages of process, risk of overlap with some of Commission's functions. (2) pure clinic model: (a) pros are easier to arrange for provision of legal advice to complainants at different stages of process; easier to coordinate work of lawyers and paralegals; easier to make arrangements to guard against duplication of Commission services; cases managed by team of human rights specialists (therefore expertise); clinic could develop educational and other material to assist parties through the process; and, (b) cons are no choice of counsel; respondents would not have access to legal representation through this model; complainants outside lower mainland would not have counsel or same access to resources (approximately 20% of complaints in 1996/97 were from areas other than Vancouver Island and Lower Mainland). (3) Mixed model (specialized clinic with option of private representation): (a) pros are same as pure clinic model plus complainants would have access to choice of counsel where requested; respondents would have access to legal aid; small experienced bar would be maintained; travel and communications costs of pure clinic model would be minimized; easier to

of these models.³⁸ It concluded with a series of questions to be addressed in order to make a final decision about which model is most appropriate.

Report of the Auditor General of Canada, Chapter 10, *Canadian Human Rights Commission and Canadian Human Rights Tribunal* (Auditor General Report) (Canada, 1998)

In 1998, the Auditor General of Canada examined the operations of the federal commission and tribunal. The focus of the audit was to examine whether: (a) the existing accountability and independence frameworks ensure independence from government while still retaining appropriate accountability; (b) the process for handling human rights complaints is accessible, equitable and well managed within available resources; and (c) the commission is in a position to implement its new employment equity audit mandate under the *Employment Equity Act* in a satisfactory manner. While the Auditor General reviewed the tribunal's financial and management controls and mediation process, there was no review of hearing procedures.

The audit revealed that the perception of independence of the commission and the tribunal from the government was "strained" particularly in major cases where the government is a respondent before the tribunal and where additional major funding is required for lengthy hearings. The Treasury Board both approves requests for such funds and is the respondent in the case being heard. The Auditor General did not find evidence of interference but noted the absence of legislative safeguards.

The Auditor General recommended changes to ensure the personal independence and quality of appointees to the commission and tribunal by increasing the transparency of the appointment process, appointing a panel of experts, eminent citizens or a legislative committee to interview

provide comparable services in all parts of the Province; clinic could service as source of advice to private lawyers; provides flexibility; and (b) cons are that there would be some restriction in choice of counsel because of funding directed to the clinic; deficiencies of the tariff would not be addressed through a mixed model although the clinic could provide advice to private bar lawyers and to extent private bar provide services, there will be a reduction in the ease of co-ordination of activities and case management reflected in the pure clinic model.

³⁸

The Report concluded that the estimated total costs of a mixed model system would be between \$323,000 and \$335,000. The approximate cost of the tariff model was said to be \$291,424.00 exclusive of difficult and complex cases and the pure clinic model to be \$349,000 to \$366,000. The authors also note that the costs of representation by the Commission represent a benchmark against which other options can be measured as this is the system in place in other jurisdictions. The Report concludes that the costs would likely be roughly comparable to the pure clinic model: "There would be substantial communication and travel costs if legal counsel located in Vancouver or Victoria covered hearings in all parts of the Province. There might be some savings in cases in which the Deputy Chief Commissioner was also represented, but those savings would be offset by the need to retain outside counsel, presumably not on the Legal Aid Tariff, when the complainant and the Deputy Chief Commission took different positions about the case. In short, both the Mixed Model and the Tariff Model seem to be less expensive than the system of representation used in most Canadian jurisdictions".

and recommend candidates for appointment and setting the salary and benefits of appointees by statute in proportion to the statutory remuneration of federally-appointed judges.

The audit revealed that major delays continued to exist in processing human rights complaints. Between 1996 and 1997, the commission took an average of approximately ten months to complete initial investigations although it had set a goal of five-and-one-half months. In 26% of the cases, the initial investigation took over one year. Most of the delay occurred in the disclosure of the investigation report to the parties. Significant delay was also attributed to the commission's lack of legal authority to enforce deadlines for the receipt of submissions.

The report also found that the commission was continuing to encounter problems in eliminating its backlog (complaints under active investigation more than nine months after being filed). Although the commission received a permanent funding increase of \$411,000 for nine full-time additional investigators to eliminate the backlog over a five-year period in 1989-90, and additional funds over and above this amount were spent for this purpose, the backlog persisted. Between 1991 and 1995, the backlog ranged from 62% to 72% of open cases. As of 1997, 48% of the cases continued to be backlogged. About the same percentage were still being investigated one year after they had been filed.

While the audit revealed that the majority of complaints were either dismissed or not proceeded with, the commission failed to record explanations for over one-third of the cases where a decision was made not to proceed. The audit revealed that the commission rarely used its authority to initiate complaints because of the consequent litigation.

The Auditor General acknowledged that investigations were taking place in a difficult environment given the expanding grounds of discrimination, the litigious environment and the continuing backlog. The report noted that the commission had been downsized following a reduction in its budget from \$16.15 million in 1993-94 to \$14.8 million in 1998-99. In the aftermath, the commission experienced a higher turnover of its investigation staff. The Auditor General stressed the importance of rigorous investigations. Based on a random sample of 50 complaint files, the Auditor General found that the commission was not consistently adhering to some of its key investigation standards, which are designed to ensure the quality of investigations.

The Auditor General's report indicated that stakeholders identified many concerns with respect to various aspects of the commission's operations. These concerns included a perception of a conflict of interest among the different roles of the commission, cursory investigations, dismissals without full investigation, delays in processing, and lack of reasons for dismissal.

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The Auditor General's report also highlighted problems with the conciliation process. It observed that the commission wears several hats in the conciliation process but is not a neutral third party. The Auditor General recommended that the commission initiate a mediation program similar to Ontario's voluntary program (where the commission acts a neutral third party with a strict separation of its mediation and investigation functions).

The Auditor General's report also focused on the work of the tribunal. The audit revealed the lengthy nature of the hearing process. The tribunal takes an average of approximately one year to complete hearings and render decisions on complaints that are not settled through mediation. Stakeholders felt that the tribunal's approach to hearings was cumbersome. The report found that the tribunal's approach to mediation was generally satisfactory but indicated that performance reporting to Parliament required improvement.

The Auditor General concluded that the federal human rights system had evolved into a "cumbersome, time-consuming and expensive" process and called for a fundamental review of the scheme by parliament.

Canadian Human Rights Act Review Panel Report, *Promoting Equality: A New Vision* (La Forest Report) (Canada, 2000)

On April 8, 1999, an independent panel, composed of retired Supreme Court of Canada Justice, the Honourable Gérard La Forest (Chair), William Black, Ms. Renée Dupuis and Professor Harish C. Jain (La Forest Panel) was established by the federal Minister of Justice to conduct a comprehensive review of the *Canadian Human Rights Act*. The mandate of the La Forest Panel was to:

- examine the Act's purposes, the enumerated prohibited grounds in the Act and its scope and jurisdiction (including the exceptions);
- review the Act's complaints-based model;
- recommend ways in which the legislative model could be enhanced or changed to improve the protections afforded under the Act while ensuring efficiency and effectiveness in the complaints process;
- consider the powers and procedures of the Canadian human rights commission and the human rights tribunal.

Research papers were commissioned on various topics from well-known experts in human rights issues. Proposals were specifically sought on two issues: (1) the addition of a prohibited ground

of social condition; and (2) the Act provision that excepts the federal *Indian Act*. A Consultation Paper was released to the public in July 1999. Round table discussions were held with non-governmental groups at various locations across the country and in Ottawa with employers, labour organizations and government departments. The La Forest Panel received over 200 written submissions, consulted with provincial and territorial human rights commissions and tribunals, former Canadian chief commissioners, the federal commission and the federal tribunal.

The La Forest Panel's final report, *Promoting Equality: A New Vision* (La Forest Report) was released in June 2000. It is a comprehensive document incorporating numerous background papers and making 165 recommendations for reform of the federal legislation and system.

The types of concerns expressed by the stakeholders³⁹ at the various round table discussions held by the La Forest Panel (many of which were shared by all participants) can be summarized as follows:

- the complaints process is too long, too costly and too complex (there are serious problems of delay and complexity);
- investigators and mediators should be more qualified and better trained;
- investigations are too convoluted and complex;
- overlapping functions at the Commission level creates problems respecting an external perception of impartiality (Commission cannot effectively be the gatekeeper, investigator, advocate and educator);
- early mediation should be available, but needs to be mindful that there may be an imbalance in the respective bargaining position of complainants and respondents in the mediation process;
- case tracking management system should be in place;
- the commission should be more transparent and should more appropriately reflect the broad diversity of the community it serves;
- tribunal decisions are inconsistent (predictability is an issue);
- resources provided to the commission are insufficient;

³⁹

As reflected in the summaries prepared by the Secretariat staff of the Canadian Human Rights Act Review Panel: www.chrrreview.org/pubs/.

- the duty to accommodate needs to be statutorily defined (difficult to define and apply and should be expressed as a positive duty; criteria/considerations should be expanded beyond health, safety and cost; provision of guidelines would be helpful);
- the Act should define prohibited grounds (e.g. define "racial/religious harassment/discrimination);
- there should be a greater emphasis on systemic discrimination and the tribunal's powers to grant remedies should be expanded to grant systemic remedies (the present system is too focused on individual complaints);
- a different "stream" and different resources should be allocated to systemic claims;
- non-governmental groups should be provided with funding to facilitate systemic discrimination court challenges;
- the commission's investigative role should be limited to cases of complex or systemic discrimination;
- the human rights perspective must enter more effectively into the design and delivery of government programs and policies;
- the commission should strengthen its role as educator;
- the rules governing practice and procedures should specify time limits.

In addition to problems of delay and complexity, concerns were expressed about the "poor reputation" of and lack of confidence in the federal commission and its processes.⁴⁰ Concerns were expressed about institutional bias given the various roles of commission staff as investigators, conciliators, mediators, educators, advocates and advisors.⁴¹ Some of the suggestions for procedural reform raised in these round table discussions included direct access to the tribunal in certain circumstances⁴² and the utilization of courts rather than tribunals for the

⁴⁰ The federal Human Rights Commission was also audited by the Auditor General, a process that took 18 months. In his September 1998 Report, the Auditor General concluded that the individual complaints system was "cumbersome, time-consuming and expensive".

⁴¹ The La Forest Panel (in Chapter 9, *Promoting Equality*) expressed the view that the "many and conflicting roles of the Commission is a central problem with the current model. The conflict creates litigation about bias, setting aside Commission decisions. It also reduces the credibility of the enforcement process, because respondents see the Commission as favouring the complainant, and complainants often have the impression that the Commission supports respondents. The perceived conflict also inhibits some functions such as the provision of guidance and advice to those who must comply with the Act because the Commission must be neutral in the complaints process since it may be called upon to judge whether its advice was correct in deciding whether to dismiss a complaint or sent it to Tribunal."

adjudication of human rights complaints. The La Forest Panel also canvassed participants for their views on the content and scope of the *Canadian Human Rights Act* (e.g., expansion of the grounds of discrimination).

The La Forest Panel concluded that the Act should: (a) provide greater emphasis on public education and awareness because human rights education and promotion are essential to addressing human rights issues and preventing discrimination; and (b) place more emphasis on the elimination of systemic discrimination.

The La Forest Panel concluded that an appropriate dispute resolution process for individual discrimination complaints must resolve the "five most serious" issues raised by the federal complaints process:

- delays;
- perceived conflict of roles;⁴³
- perception that meritorious complaints are dismissed;⁴⁴
- inability to focus or target resources;
- the importance of tribunal interpretation.

The panel also concluded that the tribunal should be preserved:

The Tribunal system must be maintained because it is an expert administrative body that can resolve equality disputes and generate decisions that inform people about compliance with the Act. The Act gives the right to an individual to seek a remedy, but also places a government agency between the individual and access to the Tribunal process to have the dispute resolved on the merits.

⁴² Raj Anand and Mohan Sharma were commissioned to prepare a *Report on Direct Access to Binding Adjudication Under the Canadian Human Rights Act*. Their report proposes a model of direct access to binding adjudication for all complaints filed under the federal Act.

⁴³ The panel viewed this as the most serious problem with respect to the federal complaints process.

⁴⁴ In Chapter 9 of its Report, *Promoting Equality*, the La Forest Panel described this "third central issue" to be: "the desire for direct access to the Tribunal, without the Commission dismissing complaints that are not settled. This, in part, stems from a concern, particularly from non-government organizations including unions, that the Commission is dismissing or refusing to deal with too many cases. They feel that there is pressure on the Commission to make do with a low level of resources, forcing it to dismiss cases for administrative reasons. There is also a recognition of the growing remedial power of the Tribunal and the realization that not only does the system serve a public interest role by reducing discrimination, but it can also provide private justice in the form of full compensation. Lack of access to the Tribunal reduces individual opportunity for private justice and consequently the credibility of the process with human rights groups and other non-governmental organizations".

The La Forest Panel considered a number of options for structural change to the existing dispute resolution system under the *Canadian Human Rights Act*. The first option concerned the establishment of three separate, independent and full-time commissioners (with responsibilities for complaints processing from intake to tribunal, for engaging in a proactive role by conducting research, initiating complaints and instructing counsel, and for carrying out education, inquiry, policy and rule-making functions respectively) with various suggestions for dealing with issues of delay (e.g., establishing statutory time limits for investigations, requiring parties to provide their evidence directly to the commission in written form, and/or making greater use of alternate dispute resolution).

The second option involved giving complainants whose complaints had been dismissed by the commission the option of proceeding directly to the tribunal.

The third option, which the La Forest Panel ultimately recommended, was the one it felt had the greatest potential for correcting the problems arising out of the current process. This option involved enabling complainants to take human rights complaints directly to tribunal:

A third option would empower a claimant to take a human rights claim directly to Tribunal, ending the Commission's monopoly on complaint processing. Claims would be filed directly with the Tribunal. This process would have a pre-hearing process to ensure that cases without merit would not proceed to a full hearing before the Tribunal. The Tribunal would ensure through its rules and orders that the parties to the case were fully informed of the issues and the evidence of the other side before proceeding to a full hearing. Legal assistance would be provided to ensure that claimants and impecunious respondents had the help needed to present their case ...

The advantages of this option are that there would be no institutional conflicts between the Commission's role as decision-maker and advocate. This would increase the credibility of the Commission as an advocate for human rights, making the other proactive activities of the Commission more persuasive. The delay at the Commission stage would be eliminated. The parties would be accountable for their own delays and the Tribunal would have more powerful tools to ensure that the parties proceeded as quickly as possible.

The Commission would be able to use its resources more effectively taking the most significant human rights cases to Tribunal to achieve the greatest good for the greatest number. The Commission would have greater control over its resources than in the current individual complaints model, allowing it to act in a proactive way to promote human rights. The Commission would also be free from some of the inhibitions created by its previous institutional conflicts. The direct access model would allow the Commission to become more transparent about its enforcement goals, emanating from the criteria it would use for selecting cases to initiate or join as a party. The Commission would be able to target problem employers and service providers and the worst human rights violations, something it could not do while bound by a process to address all complaints as though they were equally beneficial to the public interest. Even though it is

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possible that the Commission may have been able to do some of this under the existing Act, the new system we are proposing will make it easier and clearer to focus resources on problem areas.

This option would also give claimants greater control over their disputes with employers and service providers.

The La Forest Panel acknowledged that its recommended option would require greater resources for both legal representation and for the tribunal. Some of those expenditures would be offset by limiting the commission's mandate and responsibilities. The panel expressed the view that any "additional resources are money well-spent because they will provide more effective human rights protection and at the same time avoid the costs, uncertainty and frustration to complainants and respondents caused by the delays in the present system".

The La Forest Panel devoted an entire chapter, *The New Direct Access Claim Model*, to describing the dispute resolution process it envisaged. Amongst other things, the La Forest Panel made it clear that the tribunal would need to have the tools necessary to enable it to take "rigorous control" of its caseload. Those tools would include the power to make rules of procedure that have the force of law, a case management system and a pre-hearing process in which the tribunal could make determinations about whether a case should proceed to a full hearing or, instead, a "speedy hearing" on an issue or issues. The tribunal would be empowered to dismiss "claims [or defences] without merit or legal foundation and where there is no reasonable likelihood that further proceedings would establish that the claim [or defence] has merit". After a speedy hearing, the tribunal could dismiss claims for want of jurisdiction or because the claim is outside the scope of the Act (e.g., based on a ground of discrimination that is not enumerated under the Act). It could dismiss claims that are brought in bad faith (i.e., those advanced for dishonest reasons), and claims (or issues in a claim) that it has already dealt with. It could also dismiss claims that have been "fully and properly dealt with in other proceedings, such as grievances, unjust dismissal proceedings, workers compensation claims, civil actions for wrongful dismissal and court proceedings under the equality provisions of the *Charter*". The types of procedural and substantive tribunal powers recommended by the La Forest Panel included:

- broad powers to compel disclosure of documents;
- summary judgment powers;
- power to make interim orders;
- power to conduct periodic "status" hearings, with power to strike a claim or a defence based on inaction by a party to a complaint;

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- power to add interveners and new parties;
- power to require the commissioner to appear to address a point of law;
- power to award costs if a party intentionally delays the hearing process or is guilty of misconduct;
- removal of the \$20,000 ceiling for compensation for harm to dignity, respect and hurt feelings;
- power to enforce tribunal orders as orders of the court.

The La Forest Panel concluded that the one year limitation period for filing complaints should remain, with discretion in the tribunal to relieve against this requirement in two situations: (a) where the claimant was incapable of filing a claim because of a disability or other serious reason; or (b) where, at the expiration of the one-year period, the complainant could not have reasonably known he or she suffered because of a breach of the Act.

Additionally, the La Forest Panel recommended that the Act contain a form of privative clause, which would mandate judicial deference to tribunal determinations respecting procedure and fact-finding. This privative clause would not extend to tribunal determinations on questions of jurisdiction and statutory interpretation.⁴⁵ Appeals from tribunal decisions would be to the Court of Appeal rather than to the Trial Division because the tribunal is a senior administrative tribunal with expertise in the human rights area.⁴⁶

⁴⁵ This recommendation is consistent with the law in this area. It is well established that the courts will not extend any deference to human rights tribunal decisions on questions of jurisdiction, law or statutory interpretation. These areas are seen to be ones that the courts are as well-equipped to answer as are the tribunals so there is no justification for deference based on notions of relative expertise: see, for example, *Zurich Insurance v. Ontario*, [1992] 2 S.C.R. 321 at p. 338; *Canada v. Mossop*, [1993] 1 S.C.R. 554 at p. 18. Indeed, given the "quasi-constitutional" nature of human rights, it seems particularly appropriate that a human rights tribunal decision on the proper interpretation of human rights legislation be reviewed on a correctness standard. However, a high level of deference is extended to a human rights tribunal's fact-finding and adjudication. The law is also clear that, to the extent these tribunals consider Charter and other constitutional questions, their determinations on these questions will be assessed on a correctness standard.

⁴⁶ The *Labour Relations Code* provides for a limited appeal to the Court of Appeal from arbitration awards. Section 100 provides that "[o]n application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law not included in section 99(1). A recent leading human rights case, *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* (a case involving a decision of a labour arbitrator under the Code) proceeded first to the Court of Appeal pursuant to section 100 of the *Labour Relations Code*. The Court of Appeal decision was subsequently overturned by the Supreme Court of Canada. The *Human Rights Code* is silent on the question of appeals of Tribunal decisions. Accordingly, challenges are initially brought in the Supreme Court under the *Judicial Review Procedure Act*. Also, unlike labour arbitration boards, the Tribunal's decisions are not insulated by a form of privative clause.

Human Rights Review

A Background Paper for the Administrative Justice Project

Under the proposed new federal model, a commission of three full-time members would be appointed. An advisory council would also be established composed of about twelve members with human rights expertise from organizations impacted by the Act (e.g., employers, service providers, labour, non-government). The new advisory council would provide a link between the communities served by the Act and the commission and would provide independent advice to the commission on significant matters relating to its mandate.

The commission's role in the claims process would be "to choose important claims to support to (t)ribunal":

... The Commission would no longer investigate claims in order to provide a report so Commissioners could decide whether to dismiss them or send them to Tribunal as is presently the case. Rather, it would engage in a process of selecting claims that met specific criteria for support ... After making this selection, the Commission's role would be to prepare the claim for mediation and a Tribunal hearing. The Commission would thereafter have a proactive enforcement role. The Commission would have the right to join a claim based on its selection criteria during a short period specified in the Rules. It should also be able to join in a claim later in the process with the approval of the Tribunal.

...

The Commission would need to have criteria⁴⁷ to select the cases that it would join as a party before the Tribunal. We believe these criteria should be based on the principle of achieving the greatest advancement of equality.

The criteria could consist of a number of general principles contained in the Act, supplemented from time to time by the objectives stated in the Commission's Annual Report. The criteria could be established through the Commission's policy-making process and therefore be the subject of consultations carried out on an ad hoc basis or through consultation with an advisory body consisting of interested persons and organizations.

This process would enable the commission to choose to become involved in those cases where "the public interest in achieving the greatest advancement of equality is very important". It could focus its resources on those cases where its participation could have the greatest impact on the objectives of the Act. The commission's role would be to support the complainant and participate

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The criteria recommended are: (1) whether the case raises a serious issue of systemic discrimination (as might be found in a major policy of an employer or service provider); (2) whether the claim raises a new point of law or might settle one that remains in doubt; (3) whether the complexity and importance of the claim requires the specialized support of the Commission; (4) whether the claim would provide a benefit for many other individuals in the same position as the claimant; (5) whether the duty to ensure equality in employment and services was breached by activity authorized by statute or regulation; (6) whether there is a glaring unfairness in the case that should be pursued simply to ensure that justice is done; and (7) whether the case is one of public interest sufficient to justify the Commissioner joining.

as a full party. This full party status would enable the commission to continue with a complaint even if the complainant settled "based on personal interest":

... If this happened, the material supporting the claim would still support the Commission's decision to ensure that the claim proceeded through the Tribunal system in the public interest. The claimant could be called as a witness at the hearing. It would be important to allow the Commission to continue without the claimant because the Commission had chosen the case for the special reasons set out in its criteria, reflecting the importance of the case in the overall advancement of equality.

Outside of the claims process, the commission would have the following functions:

- *overall administration of the Act;*
- *monitoring and enforcement of tribunal orders;*
- *preparing and submitting annual and special reports (including reports containing the Commission's opinion on Canada's compliance with its international equality obligations);*
- *preparing policies and guidelines and carrying out rule-making activity;*
- *designing and carrying out educational and research programs;*
- *carrying out international activities;*
- *enforcing the Employment Equity Act;*
- *providing leadership in human rights and coordinating activities with provincial commissions and non-governmental organizations concerned with human rights that would promote the value of equality in Canada.*

The La Forest Panel observed that "experience in both the federal⁴⁸ and provincial jurisdictions in recent years makes a compelling case for the increased use of alternate methods for settling claims". Accordingly, it recommended that alternate dispute resolution be offered as an option early in the tribunal process. However, it was mindful of concerns about power imbalances between the parties to a human rights complaint, and for that reason recommended legal representation be provided to complainants in the mediation process. It also recognized that certain types of cases are not amenable to a mediated settlement and recommended that it not be offered, for example, where the claim concerns an act authorized by a statute or where the claim raises important and precedent-setting questions of law.

⁴⁸ The federal Auditor General in his 1999 Report recommended the adoption of a mediation process similar to the one in place in Ontario. The La Forest Panel described the Ontario situation (Chapter 12) this way: "The Ontario Human Rights Commission (OHRC) introduced mediation in 1997. This involves voluntary mediation by a neutral, independent mediator, early in the process. In its recently published assessment of about five months of experience in 1998, 72% of the cases sent to mediation were settled. The overall satisfaction rate for all parties was 74%, and 87% of participants said they would choose the mediation process against (though the actual number of responses to the survey was fairly small). The OHRC attributes much of this success to early and voluntary mediation, the perceived neutrality of the mediators, and the confidentiality of the process. Education has helped participants understand what to expect from mediation and how to prepare themselves for a successful mediation. However, we also received submissions stating that the Ontario process imposes undue pressure on complainants to settle".

Additionally, the La Forest Report made a number of recommendations respecting substantive changes to the legislation, including clarification of certain definitions and prohibited grounds and the inclusion of new prohibited grounds. A discussion of changes to the substantive provisions in the Code is beyond the scope of this background paper but may form the focus of discussion during the second phase of the Administrative Justice Project.

Howe, R. Brian and David Johnson, *Restraining Equality – Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000)

In their recent book, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000), R. Brian Howe and David Johnson analyze the effects of fiscal restraint on human rights commissions and examine the tension between increasing equality rights consciousness and the administrative structures in the human rights legal system.

Much of the work focuses on a survey conducted in 1997 to assess the performance of human rights commissions and systems across Canada. This work related to the distribution of a "report card" to 150 leading advocacy organizations and equality groups, 150 leading business and employer groups, and 75 human rights staff and officials with the federal and provincial commissions. Human rights commissions across the country received low grades for performance. Although variations across jurisdictions were not substantial, there were some differences. New Brunswick, Saskatchewan and Quebec earned the highest grades while Ontario and the federal commission received the lowest grades. British Columbia received the fourth lowest grade.⁴⁹

The comments from the three groups, which are summarized in the book, provide a useful starting point for examining the problems with our Code:⁵⁰

The Perspective of Advocacy Groups

...

... the most frequent comments made by advocates were as follows: Despite recent efforts at reform, human rights systems remain plagued by delays and backlogs. Much of this is the result of understaffing and underfunding of commissions. As well, commission staff are highly complacent, a result of decreased morale, which in turn is the result of inadequate funding. Commissions spend too much time and energy on high-profile cases at the expense of more ordinary complaints. Human rights staff are too willing to screen out 'trivial' cases, and when they do accept complaints, they too often given them inadequate attention and investigation. Human rights officers try too

⁴⁹ At p. 141.

⁵⁰ At pp. 142-9.

hard to discourage complainants from initiating complaints and, once initiated, from continuing on with them.

Advocacy groups also commented on the symbolic nature of human rights policy. In attempting to gain the support of minorities and women's groups, governments tend to stress rhetoric over substance. Governments are reluctant to back up their official support for equality rights with vigorous policies of enforcement. Not only do they underfund commissions, but they also tend to appoint 'like-thinking' people as commissioners in an effort to facilitate the mild and symbolic policy approach they desire ...

Advocacy groups commonly criticized commissions for failing to take a strong proactive approach to discrimination – that is, for not placing sufficient emphasis on investigations of systemic discrimination and on affirmative action as a remedy. The traditional, reactive case-by-case approach, even if it was carried out well, makes only a small dent on the problem of inequality They also expressed dissatisfaction with compensation levels. Respondents from Nova Scotia and British Columbia indicated that decisions and compensation awards were sometimes made in a 'quick and dirty' fashion for the sake of speed. This did not solve the problem of discrimination; it merely glossed it over. Inadequate compensation sends the message that discrimination is not such a serious problem.

...

The Perspective of Employers and Business Groups

Recurring comments by employers and business groups were as follows: Commissions have an institutional bias in favour of complainants. In the criminal law and civil law systems, attempts are made to strike a proper balance between individual rights and the interests of society; human rights systems go in the opposite direction. Commission staff tend to assume from the outset that employers (respondents) are guilty. They are less concerned with fairness and objectivity than with achieving outcomes favourable to the complainants. In the words of one business group representative in British Columbia, 'I have experienced many situations where the facts presented by an employer have not been taken into consideration at all.' Commissions are too willing to pursue trivial or unreasonable complaints and are much too insensitive to the growing legal costs faced by respondents.

Also criticized by employer and business groups was the training provided to human rights staff and the quality of their work. Human rights officers, it was suggested, lacked skill in dispute resolution. Other business groups stated that because of reductions in human rights staff and increased workloads, commissions were unable to do proper public education and training for employers on human rights issues. Finally, the view was expressed that an excessive amount of time was spent by commissions in investigation and by tribunals in adjudication. The system had become overly bureaucratic and legalistic.

The Perspective of Human Rights Staff and Officials

... As with advocacy groups, officials were most critical of commissions' promptness in handling complaints, followed by inadequate compensation to successful complainants ... Respondents gave the highest ratings for

commissions' objectivity, followed by fair procedures and attempts at conciliation. Overall, their report cards resembled those of advocacy groups more than those of employers.

The most critical members of the commissions were human rights officers and front-line staff rather than the higher-level managers and commissioners. Their comments were the most plentiful and were as follows: Commission delay and slowness to act are critical problems ...

Officials also suggested that in attempting to solve the problem of delays and to expedite the processing of complaints, commissions were entering into dangerous territory. Intake officers were becoming too quick to screen out complaints or dismiss them at an early stage ... While this focus on screening and dismissal speeds up the process, it may also cause injustice and thereby violate the mandates of the commissions. It was also suggested that the growing reliance on new technologies such as voice mail and 1-800 numbers spelled danger in terms of discouraging legitimate complaints and widening the contact gap between the public and commissions. Finally, in the area of compensation, it was emphasized that compensation levels and penalties were too low, as they did not send a strong enough message about the seriousness of discrimination.

With the benefit of these viewpoints, the authors suggest that a paradox has emerged between "rights consciousness" which has become firmly embedded in Canadian society and "rights restraint". The paradox lies in the fact that society has created a body of law to entrench and promote human rights but the policies guiding the legislation do not seem to be working. Delays in the human rights process, ongoing debates over the nature of commissions and their work, and financial cutbacks have created a culture of "rights restraint".

Howe and Johnson describe the difficult position that commissions find themselves in and make some surprising observations concerning the impact of financial restraint:

As a result, commissions find themselves in a 'no man's land.' They must deal with a society that is, at core, rights conscious. They must also deal with a variety of strong interest groups capable of articulating powerful points of view. They must also deal with governments intent on securing financial restraint. And they must also work within a framework of procedural legalities and due process. It is a devilish task, and one that is rarely appreciated in this society ...

Two unmistakable impacts of these developments bear repetition. One is that selective programs of financial restraint can inspire creative management and administration as commissions confront the need to do more with less. The other is that programs of restraint compel commissions to prioritize their policy objectives – to emphasize core responsibilities and allow secondary concerns to fade into the background. In this respect we have seen commissions emphasizing individual rights complaints and downplaying their systemic discrimination and affirmative action policies. As these priorities tend to reflect those of the broader public, it can be argued that financial restraint has actually connected commissions more closely to the general public interest ... this dynamic may serve to keep commissions attuned to the needs and concerns of

*common Canadians in these very turbulent times. They may prove to be a silver lining to the cloud of restraint.*⁵¹

The authors conclude that, despite the high level of dissatisfaction which exists, the human rights system is achieving key policy goals: complaints are being resolved, gross violations of human rights are being acted on, unsubstantiated complaints are being dismissed, the public is being educated through a variety of means, and the law is being enforced. Indeed, Howe and Johnson suggest that the concern for procedural protections, coupled with fiscal restraint, has helped make rights policy more effective by legitimizing the process and making it more acceptable to the broader legal and political community.

**Praxis Research and Consulting Inc., Final Report on the Public Consultations:
Organization Review of the Nova Scotia Human Rights Commission (the Praxis Research
Report) (Nova Scotia, 2001)**

In 2000, the Nova Scotia Human Rights Commission initiated an organizational review that involved preparation of a discussion paper, *Moving Forward with Human Rights in Nova Scotia*, outlining issues and options facing the commission and inviting public comment through a consultation process. The consultation process resulted in the release of the Praxis Research Report on June 5, 2001. The report summarizes the views expressed at public hearings but does not propose any specific recommendations for change. The questions canvassed were these:

- what should be the core mandate of the NSHRC, and how should it allocate resources and prioritize activities among its various responsibilities?
- does the NSHRC's mandate for legislative and legal action on issues of systemic discrimination need to be clarified or expanded?
- should there be a lead agency for human rights research and policy development in Nova Scotia, and if so, should it be the NSHRC, the Department of Justice, the Law Reform Commission, or some other agency or coalition of agencies?
- what might be the costs and benefits of pooling resources and more closely aligning the activities of the various administrative tribunals and other agencies that handle complaints and appeals in Nova Scotia (the NSHRC, the Ombudsman, the Labour Standards Tribunal, the Public Utilities Board, and the Labour Relations Board)?
- what might be the potential positive and negative impacts of pooling resources and more closely aligning the activities of the various Nova Scotia agencies, boards and

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At pp. 166 – 167.

commission with related mandates in the field of equality and human rights, such as the NSHRC, the Advisory Council on the Status of Women, the Disabled Persons Commission, and the Law Reform Commission?

- what is the scope for building more effective partnerships to advance the mandate of the NSHRC?
- in terms of caseload pressures and the need to improve services to the public, are there basic alternatives to the current system for investigating and adjudicating human rights complaints that should be actively considered by the NSHRC?
- what policy changes and specific action steps might be needed to improve the services provided by the NSHRC to groups who have special needs in the areas of human rights and the promotion of equality?
- what specific changes could be made to enhance case management?
- what would be the advantages and disadvantages of having a permanent tribunal instead of *ad hoc* tribunals?

The Praxis Research Report revealed a consensus in Nova Scotia that backlog and delay pose serious concerns and that the complaint process could be more efficient. The report also revealed a perception that the commission devotes most of its time and resources to its complaint function leaving the areas of research, policy development, public education and affirmative action with little attention. The report acknowledged the commission's increasing caseload and the need for additional resources.

There was also a general consensus in favour of establishing a permanent tribunal. In addition to reasons of expertise, it was felt that hearings would proceed more quickly under this model than has been the case with *ad hoc* tribunals. The point was made that "one of the major sources of delay under the present system is that lawyers and other parties do not actively research a case in its later stages until a tribunal actually sets a hearing date, at which point everyone involved springs into action". The importance of qualified appointments, reflective of diversities within the community, was also emphasized.

Conclusion

These reviews and studies reflect a significant level of dissatisfaction with respect to the operation of human rights commissions and tribunals across the country. Issues of delay, the inefficiency of multiple proceedings, perceptions of conflict of interest on the part of commission

staff who perform multiple tasks, lack of objectivity in complaint processing, lack of resources for and commitment to education, and problems with investigations have been raised in many Canadian jurisdictions. Thus, while some aspects of our legislative scheme in this province are unique, the point must be stressed that most of the structural concerns about that scheme identified in this background paper are common if not universal in federal and other provincial jurisdictions. The point should also be made that legislative reform in the area of human rights raises both complex and sensitive issues for governments. The controversial and complicated nature of any significant legislative reform in this area does much to explain why governments have generally been slow to act on recommendations contained in human rights reviews.

CHAPTER IV: SUBSTANTIVE SCOPE OF THE CURRENT CODE

Background

Before turning to the structural concerns with our human rights scheme, we offer some brief comments on the substantive provisions of the Code. While identification of possible amendments respecting the scope of the Code's protective provisions and the statutory exceptions or defences are beyond the scope of this background paper, some discussion of substantive provisions is warranted in the context of considering problems relating to their practical application. One way to increase effectiveness and efficiency in the administration of a statute like the Code is to amend its provisions to ensure greater certainty with respect to the meaning to be ascribed to specific statutory words and/or phrases.

The interpretation of human rights legislation like the Code is informed by general guiding principles established by the Supreme Court of Canada over the last two decades, as well as developing jurisprudence of that Court in relation to the meaning to be given to the specific statutory language in human rights legislation. As pointed out in Chapter III, judicial interpretation has played a significant role in the expansion of human rights legislation.

These guiding interpretive principles govern the way in which human rights tribunals must approach the task of applying their constituent legislation. The law is clear that the decisions of tribunals on questions of law and statutory interpretation will be held to a correctness standard on review or appeal. In other words, in appeal or review proceedings in respect of the decisions of human rights tribunals, the courts will determine whether these tribunals correctly interpreted the statute or the law. This situation stands in marked contrast to the more deferential standard which applies to many other types of expert tribunals. The justification for the application of a correctness standard relates primarily to relative expertise; courts have expressed the view that

they are as well - if not better - positioned to make determinations concerning general questions of law - including statutory interpretation - as are human rights tribunals.

The general interpretation principles that govern human rights legislation briefly described in Chapter III are well established. Understanding these principles helps to explain how judicial interpretation has significantly expanded human rights concepts. The extent to which this expansion has occurred is best illustrated by a review of the relatively recent developments in human rights law in relation to issues such as the meaning of discrimination and the proper interpretation of statutory justification defences to, or exemptions from, otherwise discriminatory conduct.

Recent Judicial Developments

The La Forest Panel⁵² succinctly summarized recent jurisprudential developments concerning our understanding of what it means to discriminate and of responsibility for discriminatory acts:

In the early 1980's the courts were of the view that human rights legislation was meant to deal only with intentional (or direct) discrimination. This was consistent with the idea that equality meant that everyone should be treated in the same way. As long as an employer did not intend to deny employment because of religion or race, then there was a sufficient amount of equality. This has become known as a formalistic kind of equality. It meant that as long as employees could comply with rules made with the majority in mind, then there was no harm to be alleviated by human rights law.

Adverse Effect Discrimination

In Bhinder v. Canadian National Railway (1985), the Supreme Court of Canada decided that the broad aim and purpose of the Act covered adverse effect discrimination. The Court held that an employment rule that required all employees to wear hard-hats for safety reasons discriminated against Sikh employees whose religious principles forbade any head-covering but a turban.

This decision meant that the Act covered not just acts of direct discrimination where individuals were expressly excluded from employment or services because of personal characteristics connected with the listed grounds of discrimination, but also that the Act prohibited conditions of employment and accessibility to services which did not expressly single out a group of employees but had a negative effect on them because of their personal characteristics. The Court felt that the purpose of the Act to eliminate and remedy discrimination required the recognition of the fact that a discriminatory act was harmful whether intended or not.⁵³

⁵² LaForest Report, Chapter 3, The Purpose and Language of the Canadian Human Rights Act.

⁵³ The *Human Rights Code* recognizes this development in s. 2 which provides that "[d]iscrimination in contravention of this Code does not require an intention to contravene this Code".

The concept of adverse effect discrimination was an important step towards a more comprehensive understanding of discrimination. It meant that employers and service providers could not ignore the effect of their policies on employees and customers based on the prohibited grounds.

This development initiated a legal recognition of the fact that each person is different and has different needs and capacities. The Supreme Court of Canada held in the companion case to Bhinder, O'Malley v. Simpsons-Sears (1985), that where a company policy adversely affected an employee because of her religion (Mrs. O'Malley could not work on Saturday because she was a Seventh Day Adventist), the employer had to show that it tried to accommodate her religious needs to the point that it caused undue hardship to the business. In Alberta Human Rights Commission v. Central Alberta Dairy Pool (1990), the Court decided the duty to accommodate was triggered whenever an employment rule had an adverse discriminatory effect on an employee.

Systemic Discrimination

Though adverse effect was a powerful device for analyzing whether a policy had a discriminatory effect on individuals contrary to the purpose of the Act, it was not a comprehensive concept of discrimination. This came with the idea of systemic discrimination adopted by the Supreme Court of Canada in another case under the Act.

In Action Travail des Femmes v. Canadian National Railway (1987), the Court decided that a purposive approach to interpreting the Act required the recognition of another form of discrimination with potentially greater consequences in terms of the number of people affected. This was called systemic discrimination.

The Court stated that "... systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring, and promotion, none of which is necessarily designed to promote discrimination...." It called for systemic remedies, such as the employment equity order made by the Tribunal in that case. The Court wrote that "to combat systemic discrimination, it is essential to create a climate in which both negative practices and attitudes can be challenged and discouraged."

Looking at discrimination in this way recognizes that human activities, such as employment and the provision of services, proceed on the basis of assumptions and value judgments about the capacities and needs of individuals. These assumptions often reflect ideas about the place in society of certain individuals because of their personal characteristics. This in turn may be reflected in the way the workplace is ordered, in the terms and conditions of employment, and in decisions about who should be hired and promoted. While some of these assumptions may be accurate, others are harmful, in that they create barriers to the full participation of individuals in the workplace or in access to services.

The idea of systemic discrimination exposed the underlying causes of much discrimination in the workplace. These causes related to the way employers and service providers treated differences between individuals. Differences in the needs and capacities of employees based on their disabilities, their family responsibilities or religions were assumed to be of insufficient importance to be accommodated in the system or were simply overlooked. For example, a workplace designed with the assumption that all employees are able-bodied will

create barriers for others. These barriers exist and prevent some people from participating, whether or not the assumption is conscious or whether the effects are intended.

In fact, the idea of systemic discrimination allowed for the next extension of the concept of discrimination, which was to question why employment and service systems were based on the assumption that there was such a thing as a "normal" employee or customer. The underlying assumption was that anyone who was not a "normal" employee or customer was a "special interest" whose needs had to be accommodated based on this normal standard subject to a cost limit. Categorizing an interest as "special" suggests that society has a choice about whether to recognize it or not.⁵⁴

This excerpt summarizes the way in which the concept of discrimination has been significantly expanded by the Supreme Court of Canada since the early 1980s. During this period of time, the Court has interpreted discrimination based on sex⁵⁵ to include discrimination based on pregnancy and sexual harassment. It has established that employers are liable for the discriminatory acts of their employees committed during the course of their employment.⁵⁶ It has introduced the concept of a duty of reasonable accommodation and extended that concept and the statutory exceptions of *bona fide* occupational requirement (BFOR) and *bona fide* and reasonable justification (BFRJ) in ss. 8 and 13 of the Code. Initially, the Court determined that the duty to accommodate an

⁵⁴ The La Forest Panel concluded: "We think the language in the Act should be changed to reflect the fact that, at least as far as the Act extends, there should be no such choice and that these are not "special" interests. It should reflect the idea that everyone should have the same right to participate in the matters covered by the Act. This involves adopting the notion of "substantive equality" which requires an acceptance of the fact that everyone is different and that positive measures may be needed to ensure that some individuals may participate as fully as others. These equalization measures should not be looked on as "special" measures, but rather as simply what it takes to recognize the right of everyone to participate as fully as they can in work and services. The Act should refer to the goal of full participation. The concept of "substantive equality" needs to be actualized in order to permit full participation."

⁵⁵ As was noted by R. Brian Howe and David Johnson in their text, *Restraining Equality: Human Rights Commissions in Canada* (University of Toronto Press, 2001), at p. 73: "As a result of legislative amendments and judicial interpretations, the complaint of sex discrimination has evolved considerably in the past few decades. In the early 1980's in most jurisdictions, complaints of this type were usually related to claims of unequal treatment in employment. But by the 1990s, complaints of sex discrimination covered not only unequal treatment in the workplace but also pregnancy as a barrier to employment and sexual harassment in the workplace. Complaints based on sexual orientation were among the law to be accepted by human rights commission. Legislatures were very hesitant to pass legislation protecting gay and lesbian rights, and adjudicators were reluctant to accept sexual orientation as a basis for sex discrimination ... the first jurisdictions to accept such complaints were Quebec in 1975 (under Quebec's *Charter of Human Rights*) and British Columbia, also in 1975 (as the result of liberal judicial interpretation in the *Gay Alliance* case. In BC, coverage for gays and lesbians was reversed temporarily under the 1984 *Human Rights Act*, but then included under an amendment in 1992 ... By 1998, as a result of legislative amendment and – in Alberta, PEI and the Northwest Territories – of the *Vriend* decision by the Supreme Court of Canada, all jurisdictions included sexual orientation as a prohibited ground."

⁵⁶ In the case of *Robichaud v. The Queen* (1987), 40 D.L.R. (4th) 577 (S.C.C.) at p. 584.

adversely impacted complainant arose only in circumstances of indirect,⁵⁷ as distinct from direct, discrimination.⁵⁸ The Court later extended the statutory BFOR and BFRJ exceptions to provide a defence to otherwise discriminatory conduct.

In 1999, the Court reconsidered this approach in *British Columbia v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 (*Meiorin*) which involved a decision of a labour arbitrator rather than the HRT. The La Forest Panel summarized *Meiorin* in its report:

... In that case, the question was whether certain physical fitness requirements for the job of forest firefighter were justified as bona fide occupational requirements. The Court held that its earlier approach that discrimination had to be categorized either as direct discrimination (where the defence was the bona fide occupational requirement) or as adverse effect discrimination (for which the defence was accommodation to the point of undue hardship) was too complex, unrealistic and artificial. Instead, all discrimination in employment must be justified by a bona fide occupational requirement that takes into account the duty to accommodate to the point of undue hardship.

One of the reasons for the Court's change of view was its concern that only the adverse effect analysis required a consideration of accommodation. Further, it did not require an examination of the question of whether the employment rule was based on a discriminatory standard, for example, one that was based on a male-only concept of who should normally be doing the job. This allowed systemic discrimination in the workplace to continue insofar as it maintained an employment structure based on under-inclusive ideas about who should be doing the work.

The Court said that the new bona fide occupational requirement standard required employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard. This would suggest an amendment that would place a positive duty on employers and service providers to eliminate discrimination in the workplace and in the way

⁵⁷ Examples of indirect discrimination include: a rule that requires employees to work on Monday (*Alta. (H.R.C.) v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489; a rule that all employees wear a hard hat at a particular work site (*Bhinder v. C.N.R.*, [1985] 2 S.C.R. 561); a rule that employees work Friday evening and Saturdays on a rotating basis (*O'Mailey v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970).

⁵⁸ Examples of direct discrimination include: an employer rule requiring mandatory retirement at age 60 (*Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202; *Large v. Stratford (City)*, [1995] 3 S.C.R. 733; *Saskatchewan (Human Rights Comm.) v. Saskatoon*, [1989] 2 S.C.R. 1297); an anti-nepotism hiring policy which disqualified spouses and relatives of full-time municipal employees and town councilors from employment with the town (*Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279); a rule that teachers in a Roman Catholic School adhere to the tenets of the Roman Catholic faith (*Caldwell v. Stuart*, [1984] 2 S.C.R. 603); provision of disability benefits for all health-related conditions except pregnancy (*Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219); and a provision in an employer disability insurance plan which places limitations on benefits for nervous, mental or emotional disabilities, but not for other kinds of disability (*Gibbs v. Battlefords & District Co-operative* (1996), 24 C.C.E.L. 167 (S.C.C.)).

in which services are provided. The Supreme Court of Canada said: "They must build conceptions of equality into workplace standards." This is also consistent with the duty imposed on employers covered by the Employment Equity Act to identify and plan to eliminate barriers to employment for the groups targeted by that Act.⁵⁹

Shortly after the *Meiorin* decision was released, the Court released its decision in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (*Grismer*). In *Grismer*, the Court applied the principles established in *Meiorin* to the application of the *bona fide* and reasonable justification defence provided for in s. 8 of the Code. The complainant in that case suffered from homonymous hemianopsia (complete loss of his peripheral vision on the left side in both eyes) because of a stroke. The Court determined that the Superintendent of Motor Vehicles acted contrary to s. 8 of the Code when he cancelled the complainant's driver's licence because he did not meet the minimum 120 degree field of peripheral vision medical standard for safe driving. The impact of *Grismer* has been summarized⁶⁰ as follows:

Applying the Meiorin test in assessing the driving ban for persons with HH [homonymous hemianopsia], the Supreme Court focuses on the extent of the duty to accommodate under the third step of the Meiorin test. In Grismer, McLachlin J. (as she then was) elaborates on her earlier decision in Meiorin and provides additional guidance as to what will considered to be "accommodation":

"Accommodation" refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There is more than one way to establish that the necessary level of accommodation has not been provided.

In Meiorin, the Government failed to demonstrate that its standard was sufficiently accommodating, because it failed to adduce evidence linking the standard (a certain aerobic capacity) to the purpose (safety and efficiency in fire-

⁵⁹ In 1997, amendments were introduced to the federal Act which required employers or employee associations wishing to establish that a job requirement came within the *bona fide* occupational requirement to establish that they attempted to accommodate the individual or class of individuals involved to the point of undue hardship taking into consideration health, safety and cost. The La Forest Panel was of the view the federal Act should also make it clear that the duty to accommodate "includes an affirmative duty for employers and service providers to accommodate to the point of undue hardship. This would be consistent with the idea that accommodation of differences is not a defensive, and therefore unusual matter, but is part of the recognition that everyone is different and should be able to participate to their potential. This is also a lesson that we can take from the Supreme Court's recent decision". The La Forest Panel noted that employers were not happy with the 1997 amendments primarily because the Act limited the factors to be taken into account in the accommodation analysis. The concerns expressed related to the fact that matters such as seniority or shift preferences as provided for in collective agreements could not be taken into account. The La Forest Panel said that it "did not wish to re-open the discussions surrounding the June, 1998 amendments" in light of the Supreme Court of Canada decision in *British Columbia Service Employees' Union*.

⁶⁰ By Michael R. Howcroft and Randal J. Kaardal in their article *Meiorin, Grismer, and the Duty to Accommodate* (CLE Human Rights – 2000 Update).

fighting). In *Grismer*, a general connection was established between the standard (a certain field of peripheral vision) and the purpose or goal of the restriction (reasonable highway safety). However, the appellant (Mr. Grismer's estate) argued that some drivers with less than the stipulated field of peripheral vision can drive safely and that the standard is discriminatory because it does not provide for individualized assessment.

...

Ultimately, the Court found that there are two ways that the Superintendent of Motor Vehicles could show that its absolute ban on drivers licences for persons with HH was reasonably necessary. First, it could show that no one with a particular disability could ever meet the desired objective of reasonable highway safety and, second, the Superintendent could show that persons with HH could not be individually tested by the Superintendent without undue hardship.

...

The *Grismer* decision clearly indicates that in defending a discriminatory policy, it will be necessary to provide concrete evidence both to justify the policy itself and its application to each individual affected by it. As such, there is a high evidentiary burden placed on any employer or service provider in justifying rules of general application it establishes for its operation.

...

While the requirements an employer will need to demonstrate in order to uphold its policies and standards will no doubt continue to evolve as courts and human rights tribunals continue to consider these decisions, there is no doubt that the Supreme Court's decision in *Meiorin* and *Grismer* have not necessarily made it easier to establish when an employer has effectively accommodated its employees.⁶¹

These recent decisions graphically illustrate how human rights law continues to evolve and the degree to which judicial interpretation informs the application of broad Code concepts like "discrimination" and "bona fide and reasonable justification".

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The authors also write that: "[T]he Court rejected any suggestion that it would not be possible to test persons with HH short of undue hardship. The Court appears to have placed little weight on the Superintendent's suggestion that it would be prohibitively expensive to conduct individual assessments of visually impaired drivers. While in some circumstances excessive costs may result in undue hardship, the Court warned that decision-makers should be wary of putting too low of value on accommodating the disabled. Ultimately, the Court found that while the costs of accommodation is relevant, courts and tribunals should be reluctant to rely upon impressionist evidence of increased expense in justifying discriminatory standards. This is particularly the case for government agencies, who the Court noted perform many expensive services for the public." Interestingly, in the *Grismer* case, having concluded on the application of the *Meiorin* test that a s. 8 Code violation had occurred, the Court made the following observation: "[43] This is the conclusion that the *Meiorin* test requires, on the evidence and findings in this case. The question may be put, however, whether this approach places too high an evidentiary burden on the government, particularly in situations involving public safety. The obvious answer to this question is that it is the Legislature, not the Court, which has placed the evidentiary burden of showing reasonable necessity once *prima facie* discrimination has been made out ..."

The Supreme Court's jurisprudence on the *Charter* has also informed and shaped human rights principles.⁶² That Court has long recognized the close relationship between human rights and s. 15 of the *Charter* and many constitutional equality cases well illustrate the way in which broad human rights principles inform s. 15 of the *Charter* and vice-versa.⁶³ Section 15 of the *Charter* has been relied on as a basis for expanding human rights legislation. For example, in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the Court held that the failure to include sexual orientation as a prohibited ground of discrimination in Alberta human rights legislation constituted an unjustifiable denial of equality rights under s. 15 of the *Charter*. The Court read in the words "sexual orientation" to the expressly-listed prohibited grounds as this was the most appropriate way of remedying under-inclusive legislation.

Lack of Certainty in Human Rights Law under the Code

The pace at which the Supreme Court of Canada has shaped the law in the human rights area has contributed to difficulties in articulating and understanding clear legal rules governing the responsibilities of employers and service providers and the content of their positive duty to

⁶² While analogies between human rights and ss. 15 and 1 Charter principles are readily drawn, human rights legislation regulates the activities of both public and private actors, whereas the Charter only applies to government and government actors. This point was made by Mr. Justice Cory in *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 at pp. 1161-3, 1195-7.

⁶³ See for example, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at pp. 667-74, 678-79, 681-2; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 172 *et seq.* A more recent example is provided in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, [2000] SCC 28 (Q.L.), a s. 15 disability-based Charter action, where the Court held: "[40] The different elements or aspects of the disability analysis are relevant to human rights legislation as well as to Charter scrutiny. In fact, two recent employment cases before this Court further illustrate these relationships. In [the *Grismer* case], the appellant, whose eyesight was impaired by a stroke, was assumed by the provincial Superintendent of Motor Vehicles, without individual testing, to have a sufficient level of functional limitation to disqualify him from holding a driver's licence. The Court held him to be entitled to an individual test to determine whether the attributed limitation did in fact exist. On the other hand, in [*Meiorin*], a woman firefighter named Tawney Meiorin failed a series of strenuous physical endurance tests, thus exhibiting a physical limitation broadly related to her gender, but succeeded in her complaint by showing that the standards themselves had never actually been related to the demands of firefighting. The standards merely tracked the aerobic performance of male firefighters. While not a case of disability as such, the *Meiorin* case illustrates a situation where a personal characteristic enumerated in s. 15 (gender) is shown to be related to a more limited aerobic capacity (functional limitation) but this is then wrongly converted into a state-imposed job handicap which was no less objectionable because it was misconceived rather than intentionally discriminatory. The "problem" did not lie with the female applicant, but with the state's substitution of a male norm in place of what the appellant was entitled to, namely a fair-minded gender-neutral job analysis. A parallel view would be urged in cases where the functional limitation is related to a disability". The point should be made that, while s. 15 Charter concepts inform human rights concepts and vice-versa, the burdens of proof in a Charter action and human rights proceeding are quite different. Additionally, the human rights *bona fide* and reasonable justification (or occupational qualification) defences need not be interpreted in a way that reflects or is consistent with s. 1 of the Charter.

accommodate to the point of undue hardship. In contrast to the legislation in our province,⁶⁴ some jurisdictions statutorily define concepts such as "disability", "discrimination", and "harassment". In some jurisdictions, the *bona fide* occupational requirement and reasonable justification defences are also defined or elaborated upon.

The difficulties faced by those who are called upon to interpret and apply the Code are compounded by the lack of clarity around certain Code concepts.⁶⁵ A question for further consideration in Phase 2 of the Human Rights Review is whether, in furtherance of a goal of greater certainty and efficiency, some of these concepts would benefit from legislative definition. We see this as a key question for stakeholder consultation.

⁶⁴ For example, in British Columbia, the *Human Rights Code* is silent with respect to the duty to accommodate. By operation of legal principles developed by the Supreme Court of Canada, the duty to accommodate forms part of the defences provided for in sections 13(4) and 11 (the *bona fide* occupational requirement defence) and section 8(1) (the *bona fide* and reasonable justification defence). Absent specific statutory provision, the types of factors that are to be taken into account in determining whether the duty has been discharged to the point of undue hardship include: health and safety concerns (in which case consideration must be given to the magnitude of the risk and the identity of those who bear it); financial costs; disruption of a collective agreement; problems of morale of other employees; interchangeability of the work force and facilities; and the size of the employer's operation. See: *Central Alberta Dairy Pool*, *supra*. In *Chambly, Com'n Scolaire v. Bergevin* (1994), 115 D.L.R. (4th) 609 (S.C.C.) Mr. Justice Cory said (at p. 626) that "... these factors are not engraved in stone. They should be applied with common sense and flexibility in the context of the factual situation presented in each case".

⁶⁵ For example, some practitioners have expressed the view that the Supreme Court of Canada decisions in *Meiorin* and *Grismer* have done little to advance a clearer understanding of the circumstances in which the duty to accommodate has been discharged in a given case. In their article, *Discrimination and Disability in the Workplace*, (CLE Human Rights: Disability Issues, November 1999), Lyndsay Lyster and Kate Bayne write that "[h]uman rights issues involving discrimination in the workplace constitute one of the areas of greatest concern to employers today. They are of particular concern not only because of the uncertainty as to what is required of an employer in order to comply with certain human rights concepts, such as the duty to accommodate". Of the *Meiorin* case specifically, they observe: "In the end, the question remains to what extent do we impose upon an employer the obligation of eliminating systemic discrimination: the Court in *Meiorin* appears to impose a considerable obligation on an employer in this regard and unfortunately, it is not clear whether this obligation extends equally to all employers or is greater in the case of the Provincial Government; only time will tell". Frances Kelly, in her article *Disability Discrimination and the Justification Defence*, (CLE Human Rights: Disability Issues, November 1999), makes the point that *Meiorin* "focuses a lot of attention on the setting of the standard itself". It is Ms. Kelly's opinion that it will now be extremely difficult for employers or service-providers to set a blanket standard if there is any alternative to it. She acknowledges that "[n]o doubt the principles coming out of the case will be further developed and refined over the next few years". On the other hand, the Canadian Bar Association submission to the La Forest Panel (December 1999) asks that the defences not be changed: "They have been established and refined through a huge body of case law from courts, tribunals and labour arbitrators. They are therefore well understood by practitioners, and significantly altering them would cause a good deal of confusion in the human rights community. In addition, the defences have generally been interpreted in a manner which appropriately balances the rights of complainants and the legitimate interests of respondents. The defences are appropriately general to include a wide variety of circumstances".

CHAPTER V: STRUCTURAL ISSUES WITH CURRENT SCHEME

Although it may be possible to achieve greater certainty and efficiency with amendments to the substantive provisions of the Code, the fundamental focus of this review is on structural issues because of the uniform and widespread level of dissatisfaction with that aspect of the current legislative scheme. This chapter will begin with a brief overview of the current enforcement scheme under the Code. We will then summarize the issues and concerns that were brought to our attention during the preparation of this background paper. As will be seen, the concerns expressed by individuals and groups in this province continue to echo those that are being communicated across the country about human rights schemes generally. We expect that many additional concerns will be raised during the second phase of public consultation following distribution of this background paper.

The point should also be made that the concerns that were brought to our attention with respect to the HRT focused primarily on the substance of decisions, some of which have garnered considerable public attention. As substantive issues are beyond the scope of our mandate, we will focus only on those concerns that relate to the HRT's process.

After outlining the various concerns raised by stakeholder groups and practitioners in this area, we will turn to a more detailed analysis of the issues of multiplicity of proceedings and delay in the chapters that follow.

Description of Current Scheme

The Compliance Program is operated by the CIM with an annual budget of \$2.05 million and a staff of thirty FTEs (full time equivalents). The Compliance Program administers the intake, screening, mediation, investigation and dismissal or referral of complaints. It receives approximately 20,000 telephone inquiries annually with respect to potential complaints of discrimination. The vast majority of individuals who contact the CIM are referred to other agencies. Approximately 3,000 complaint forms are sent out in response to the telephone inquiries. Of those, the CIM receives approximately 1,500 written complaints each year.⁶⁶ The written complaints are initially assessed by one of five complaint analysts with the CIM. Approximately one-half of the written complaints are screened out or redirected by complaint analysts and one-half of the complaints are served on respondents. Screened out or redirected

⁶⁶ By way of comparison, the commission receives approximately 160,000 to 200,000 inquiries each year. Information packages are sent to approximately 4,000 individuals. Of those, approximately 2,000 written complaints are filed. Complaints are drafted by commission staff and respondents have 21 days to file a written response.

complaints typically involve very weak allegations that have no prospect of success or complaints that can be dealt with more appropriately in another forum. Complaint analysts typically refer approximately sixty to seventy complaints to the DCC as potentially raising issues of systemic discrimination.

Approximately 750 written complaints are referred on to human rights officers for investigation. Investigations consume approximately 50% of the Compliance Program budget. Human rights officers provide the parties with the opportunity to enter into mediation during the exchange of submissions. The "letter of service" for the complaint contains a standard paragraph indicating that the CIM offers mediation services to both parties.

Approximately 150 complaints are dismissed following receipt of the respondent's submission and complainant's reply. Another 150 cases are settled either during or after investigation. Following investigation, approximately 325 cases are dismissed and approximately 125 cases are referred to hearing. As a matter of policy, the CIM does not refer complaints to hearing without an investigation although there is discretion to do so under the Code.

The CIM has put in place a mechanism for reconsideration of dismissal decisions. Under the policy, the CIM will reconsider complaints in circumstances where: (a) there was an error or accidental slip or omission that occurred in drawing up the decision such that its wording does not reflect the obvious intention of the decision-maker; (b) the decision-maker has lost jurisdiction; or (c) where the interests of justice and fairness in relation to the proceedings themselves require reconsideration of the matter. Thomas F. Beasley, the CIM's legal counsel, recently described the policy in an article entitled *The Human Rights Commission: The Complaints Investigation System* (CLE Human Rights 2000 Update) as being:

... based on the principle that an administrative agency (in this case the CIM) may reconsider a decision in limited circumstances. The policy objective is to provide a means to correct an error, unfairness or injustice which is clear on the record in an efficient and timely manner.

The purposes of the Code would not be furthered if everyone is required to seek judicial review when the error, unfairness or injustice is obvious. The CIM can and should correct such a decision in cases where the matter is brought to the attention of the CIM. The CIM's reconsideration policy also recognizes the benefits of certainty of result. It is for this reason that the timelines [under the policy] are tight.

Last year, approximately sixty complainants sought reconsideration under the reconsideration policy. Of those five or six were referred back to investigation. The reconsideration process occupies approximately 30% to 40% of a senior policy officer's workload.

The CIM performs a significant screening function. A large majority of complaints filed with the CIM are disposed of either prior to or after investigation, without being referred to hearing. In the 2000/01 year, for example, 19.3% of the complaints were dismissed prior to investigation and 48.8% were dismissed following investigation. Of the 736 cases closed by the CIM in the 2000/01 year, 15.6% were settled and only 16.3% were referred to the HRT for hearing.⁶⁷

The DCC participates in complaints at both the investigation and hearing stage. Since the DCC does not have the resources to become a party to all complaints, he has established policies governing his involvement both at the pre- and post-referral stages. In determining whether or not to become a party to a complaint prior to referral under s. 21(3) of the Code, the DCC is interested in complaints that fall within any of the following categories:

- allegations of discrimination that may be systemic in nature;
- allegations that a law, regulation or government policy is discriminatory or has a discriminatory impact on a disadvantaged group;
- complaints that allege that a collective agreement provision is discriminatory in purpose or effect;
- complaints where considerations arise as to whether the human rights issues may be or are being dealt with in another forum;
- complaints raising issues concerning the jurisdiction of the CIM to accept such complaints (unless jurisdictional question resolved by established case law);
- complaints alleging either violations of s. 7 (anti-hate provision) or s. 43 (retaliation provision) or employer discrimination alleged to have occurred as a result of the implementation of an employment equity or other special program.

In determining whether or not to become a party to a complaint referred to hearing,⁶⁸ the DCC will consider the following factors:

- whether the complaint involves an allegation of systemic discrimination;

⁶⁷ 2000/01 Annual Report of the British Columbia Human Rights Commission.

⁶⁸ As at March 31, 2001, the DCC had participated as a party in relation to more than 75 hearings before the Tribunal.

- whether the complaint identifies a systemic cause, a systemic impact and/or the potential for a systemic remedy;
- whether the complaint could lead to a resolution, either through adjudication of mediation, that will have a significant social impact;
- whether the resolution could impact a significant number of people who have membership in the protected group;
- whether the complaint raises legal issues that are of significant importance to the commission;
- whether the potential resolution of the complaint could include a special program or could be promoted throughout the province as a remedy to address similar issues in future complaints against similar respondent communities.

The DCC also participates from time to time as an intervener, in the name of the HRC, in judicial review or appeal proceedings involving important human rights issues.⁶⁹

Both CIM and DCC staff receive training to identify issues of systemic discrimination for the purposes of identifying those complaints that may be of interest to the DCC. When human rights officers refer complaints to the DCC, his staff determine: (a) whether the complaint raises issues of sufficient interest to warrant participation; (b) what contribution the DCC can make by participating; and (c) whether the DCC can participate based on available resources. If staff make a recommendation to participate, the complaint is discussed at a Public Interest Program meeting and the DCC then makes the decision whether or not to participate.

To date, the DCC has become a party to less than 25% of the complaints referred to his office by CIM staff. If the DCC participates in the complaint, all communications with the CIM, other than those regarding purely procedural matters, are in writing to ensure that the DCC's involvement is transparent to all of the parties.

The DCC has not yet exercised his power to initiate a complaint for three reasons: (a) his belief that this power should only be exercised when there are no other effective options and there usually are options; (b) lack of resources; and (c) a recognition that initiation of a complaint by his

⁶⁹ For example, the DCC participated as an intervener in the Supreme Court of Canada cases of *British Columbia (P.S.E.R.C.) v. B.C.G.E.U. ("Meiorin")*, (1999), 176 D.L.R. (4th) 1 (S.C.C.) and *Grismer v. British Columbia (Superintendent of Motor Vehicles)* [1991] S.C.J. No. 73 (Q.L.).

office is a serious matter requiring a considerably higher level of certainty about the existence of discrimination than is required of an individual complaint.⁷⁰

In contrast to other jurisdictions, the DCC does not have carriage of the complaints that are referred to hearing. Complainants must assume carriage of their own complaints but are entitled to automatic funding through the Legal Services Society Legal Aid Program without a financial eligibility or means test.⁷¹ Legal aid funding comes out of the HRC's budget. Complainants are entitled to legal aid assistance for both settlement conferences and hearings before the HRT. Legal representation may also be provided to complainants where necessary to respond to judicial review applications. The CC also has discretionary authority to authorize legal representation in other circumstances.⁷²

In common with other jurisdictions, there is no automatic entitlement to legal representation for respondents. While respondents may apply for legal aid funding, they must meet certain financial eligibility tests. As a consequence, respondents who do not qualify for legal aid generally retain legal counsel at their own expense or appear at settlement conferences and hearings without representation.

Once complaints are referred to hearing, parties must deal directly with the HRT. Although the HRT was established in 1997, it has only existed in its current form with a comprehensive pre-hearing case management process since September 1999. There are presently five full-time members and three part-time members, although this complement is very recent.⁷³ Of the five full-time HRT members, one member also acts as registrar and one member is on part-time

⁷⁰ The Ontario Commission is currently setting up a program for commission-initiated complaints and anticipates that approximately six complaints a year will be initiated.

⁷¹ Although administratively the costs for legal aid funding are borne by the HRC (and formerly the Human Rights Council).

⁷² See also, *Human Rights in the Workplace* (CLE Human Rights '97, October 1997), where the Chief Commissioner explained (at p. 3.5.04) that: "... The Legal Service Society pays counsel representing parties, and these costs are billed back to the Commission. For the past three years, the expenditures have exceeded the budgetary allocation. In cases where there is more than one complainant, the arrangement with the Legal Services Society sometimes results in multiple counsel being retained. Consequently, hearings become more complex, prolonged and costly. Professor Black's 1994 report also identifies many inadequacies in the manner in which legal representation is provided and that is a sentiment that many organizations and individuals have echoed. Lastly, a problem arises when the counsel who are representing the parties are not always specialists in human rights law and process, thus hindering the quality in presentation."

⁷³ In 2000/2001, the HRT did not have an adjudicating chair, one member resigned and was not replaced for almost six months and another member went on medical leave.

medical leave and is not available to sit as a hearing member.⁷⁴ The HRT has a staff equivalent of 4.83 FTEs, composed of two part-time lawyers, two hearing case managers,⁷⁵ an office manager and one part-time receptionist/legal secretary. The HRT's annual budget is \$1.25 million.

Black recommended the utilization of part-time members on a regional basis in his 1994 report, anticipating that part-time members would live outside the Lower Mainland and southern Vancouver Island. It was his view that part-time members should not be appointed simply because there were not enough full-time adjudicators to deal with the volume of cases. Notwithstanding this, all three part-time members reside in the Lower Mainland and are used by the HRT only when a full-time member is not available.⁷⁶

In 1999, in order to facilitate just and timely resolution of complaints, the HRT sought a series of amendments to the Code that would enable it to better manage its pre-hearing process. Amendments were introduced in July 1999 giving the HRT the power to make rules respecting the practice and procedure for the conduct of pre-hearing matters and hearings including rules:

- requiring the parties to attend a pre-hearing conference in order to discuss issues relating to the complaint and the possibility of simplifying or disposing of issues;
- respecting disclosure of evidence (including pre-hearing disclosure and pre-hearing examination of a party on oath or affirmation);
- specifying the form of notice to be given to a party by another party or by the HRT requiring a party to diligently pursue a complaint and the time within and manner in which the party must respond to the notice;
- respecting service of notices and orders, including substituted service;
- requiring a party to provide an address for service or delivery of notices and orders; and
- providing that a party's address of record is to be treated as an address for service.

⁷⁴ This means that the HRT members available for hearings are spending a majority of their time in hearings. While this accommodates a timely hearing of the complaint, it makes it difficult to issue timely decisions.

⁷⁵ One is presently away on maternity leave.

⁷⁶ Utilization of part-time members is a costly way of providing HRT services. For example, in the fiscal year 2000/2001, one-quarter of HRT hearings were conducted by part-time members. The approximate HRT expenditure to part-time members in that fiscal year was about \$75,000, exclusive of support services provided by the HRT staff to part-time members. Additionally, most of the part-time members have other work commitments and therefore have varying availability for HRT hearings. This is particularly a concern for scheduling the continuation of on-going hearings.

These amendments also gave the HRT corresponding order-making powers, as well as mediation powers and the power to dismiss a complaint if a party fails to diligently pursue a complaint.

In the 2000/01 fiscal year, 123 complaints were referred to hearing by the HRT. During that period, eighty-one complaints were settled without a hearing and six were settled during the hearing. The HRT held 246 pre-hearing conferences and forty-seven hearings with an average hearing length of 4.57 days. Eleven of those hearings extended beyond one week in duration. Only one of the hearings dealt with a constitutional issue and seven dealt with broad systemic issues.⁷⁷ The HRT issued sixty-five preliminary decisions and thirty-seven final decisions.

The statistics for the first six months of this fiscal year suggest that the workload for the HRT is increasing.⁷⁸ Between April and September 2001, sixty-four complaints were referred for hearing, forty-seven complaints were settled without a hearing and two were settled mid-hearing. In the first six months of this year, the HRT held 120 pre-hearing conferences and fourteen hearings with an average hearing length of six days. Seven of those hearings extended beyond one week in duration. Only one of the hearings dealt with a constitutional issue and three dealt with broad systemic issues. The HRT has issued forty-one preliminary decisions and thirteen final decisions so far this fiscal year.

Concerns with Current Scheme

Processing of Complaints

During the preparation of this background paper, we met with the HRT and the HRC. We also discussed the human rights process with a number of practitioners who represent complainants and public and private sector respondents, and received a written submission from the Committee for the Advancement of Human Rights (CAHRTS).⁷⁹

⁷⁷ This includes those cases where the decision of the HRT had, or will have, a broad systemic impact even though systemic issues were not raised by the parties.

⁷⁸ As July and August tend to be slower months.

⁷⁹ The Committee members are Peter Beaudin (Advocate, B.C. Human Rights Coalition), Anita Braha (Legal Counsel), Barbara Cornish (Supervising Legal Counsel, B.C. Human Rights Coalition), Hanne Jensen (Human Rights Consultant), Frances Kelly (Legal Counsel, Community Legal Assistance Society), Sarah Khan (Legal Counsel, B.C. Public Interest Advocacy Centre), Wendy Liew (Human Rights Consultant, Director, B.C. Human Rights Coalition), Susan O'Donnell (Executive Director, B.C. Human Rights Coalition), Kenneth W. Smith (Legal Counsel & President, B.C. Human Rights Coalition) and Catherine Sullivan (Legal Counsel).

Human Rights Review

A Background Paper for the Administrative Justice Project

The overwhelming majority of concerns expressed to us focused on the complaint processing system. The CAHRTS submission identified a number of difficulties with the current complaint process and expressed serious concern about its efficiency and cost effectiveness. CAHRTS identified concerns regarding delays at intake and investigation, unevenness and inconsistency between HRC staff decisions, duration, complexity and costs of the process, inadequacy of appeal mechanisms with respect to the HRC's decisions, rigidity of the complaint investigation process, and lack of flexibility needed to provide prompt, fair and effective service to complainants and respondents.

Others expressed concern regarding the objectivity of CIM staff in the processing of complaints. There is a perception that there is an emphasis on dismissal statistics rather than proper disposition of complaints. There is a perception on the part of many complainants that complaints are screened out unnecessarily and the gate-keeping function is not consistent with the broad goals set out by the HRC. There is a perception on the part of many respondents that the complaint processing system favours complainants. Practitioners who represent large corporate clients referred to an "anti-employer" bias manifested by CIM staff in a number of ways. For example, human rights officers have contacted counsel for corporate respondents to request settlement funds before the complaints were actually served on their clients. Counsel who act for large employers or businesses are sometimes made to feel that "cutting a small cheque" should not be a hardship for their clients regardless of the merit of the complaint.

Related to this concern is the perception that CIM staff use a double standard for document disclosure during the investigation process, with a higher burden being placed on respondents. This issue often arises in the context of employment-related disability complaints where the complainant seeks access to personnel files and the respondent seeks access to the complainant's medical file. Respondents claim they have difficulty accessing relevant material from the complainant's files.⁸⁰

Concerns were expressed with respect to the knowledge and training of investigators. CAHRTS raised the issue of inconsistency of decision-making on the part of CIM staff. Counsel for employer and business groups identified a concern that investigators often lack sufficient knowledge of the principles of administrative fairness which leads to "overprocessing" of

⁸⁰ The CIM however maintains that one standard for disclosure applies to all parties. Investigators routinely request medical information from complainants and information from personnel files from respondents. While investigators may not provide copies of the information to the other side because of privacy concerns, they do summarize the relevant portions in the report. The CIM maintains that complainants who are not forthcoming with requested information face dismissal of their complaints.

complaints because human rights officers do not have sufficient confidence to limit the number of submissions during investigation. Although the process generally contemplates one set of submissions (a response to the complaint from the respondent and a reply from the complainant), parties manipulate the system by filing multiple submissions in a process which one senior legal counsel referred to as "submission volleyball". This practice leads to protracted investigation and increased legal and administrative costs for processing complaints.

Many of the individuals we spoke to questioned the need for the investigation process at all. There appears to be a widely-held view that investigations are unnecessary for many complaints.⁸¹ CAHRTS recommends elimination of the investigation process altogether and adoption of a "direct access" model whereby complaints would be filed with the HRT. Others who represent employers and businesses also indicated that the investigation process does not generally add value to, or assist in, the resolution of a complaint. They expressed support for a direct access model but stressed the importance of proper statutory criteria for summary dismissal of complaints.

Referral/Dismissal Decisions

Advocates and counsel who work in this area feel there is a lack of clarity concerning the basis for decisions under ss. 26 and 27 of the Code. Section 27(1) sets out the grounds on which the CIM may dismiss a complaint. While s. 27(3) provides that the CIM must provide reasons for the

⁸¹ See, for example, an article prepared for CLE in the fall of 1997 by Donald J. Jordan, Q.C., *The Investigation and Mediation Process Pursuant to Part 3 of the Human Rights Code – Should the Current System be Maintained?* (CLE Human Rights '97). Mr. Jordan is highly critical of the investigation and mediation process. In his concluding remarks, he writes: "... I find the existing system frustrating personally and, professionally, I resent having to advise my clients that, even in circumstances where they vigorously assert that they have done no wrong, it might be more economically prudent to pay some money to make the matter go away. In this way they can avoid legal costs and have some complaint hang over their head like the sword of Damocles for a substantial period of time. Giving such advice simply makes me complicit in a process which can lead to the payment of money simply because a complaint has been made and it would be too tiresome, frustrating, and expensive to await an adjudication on the merits. I would suggest the whole system needs to be revamped. There does not appear, to me, to be any need for continuing the process of investigation. It is minimally useful at best and harmful at worst. However, I recognize that the system must be more 'user friendly' than the system of pleadings used in courts but it cannot be so 'user friendly' that it ceases to be fair to a respondent. I suggest that applications should be required to meet a certain minimum standard before they are processed ... The decisions which the Commissioner makes under the legislation regarding whether the matter should proceed to hearing or be dismissed should be treated as exactly what they are. They are a preliminary determination of the matters at large between the parties. As such, they ought to be preceded by a system which at least ensures minimal compliance with the rules of natural justice and which is responsive only to 'facts' and not perceptions. Anything less, as I have stated before, I believe simply diminishes the important values which human rights legislation is intended to vindicate".

decision to dismiss, there is no corresponding statutory requirement to provide reasons for the decision to refer to hearing under s. 26(5).

Consequently, there is a concern that the referral process is not well understood nor well communicated to stakeholders in the community. Where the CIM determines that all or part of a complaint should be dismissed prior to or following investigation, a decision letter is sent to all parties outlining reasons for the dismissal. Where, however, the CIM determines that all or part of a complaint should be referred to hearing, there is no explanation for the basis of the referral. Counsel who act for respondents find it difficult to explain referral decisions to their clients in the absence of such reasons.⁸²

CAHRTS also expressed concern that there is an inadequate appeal process for dismissal decisions. Although the Code initially contained a review mechanism in s. 28.1, that provision was never proclaimed in force. While the CIM has developed a reconsideration policy, it has no statutory basis and, in many respects, simply reflects common law *functus officio* principles applied in the administrative law context.⁸³

Legal Representation and Legal Aid

The system for funding legal representation for complaints continues to generate criticism. There is ongoing concern regarding the amount of legal aid funding available for human rights complaints. Legal counsel receive eight hours of general preparation time and up to eight hours of hearing time at \$80.00 per hour per day with a small amount of additional preparation time for hearings that go beyond two days. The amount of funding is often inadequate, leaving counsel in the difficult position of either running the case without adequate preparation or working for only partial compensation.

There is also a perception of unfairness stemming from the automatic entitlement of complainants to legal aid and the need for respondents to meet a financial means test in order to qualify for funding. As indicated in the Black/Thomson Legal Representation Report, the rationale for providing automatic funding for complainants but not respondents is based on the public interest

⁸² The HRC has pointed out that a dismissal decision leads to the extinguishment of rights whereas a referral decision leads to a hearing hence, the focus of the Code on reasons for dismissal decisions. Furthermore, reasons for referral are given where the HRO has recommended dismissal and the CIM's delegate nonetheless decides to refer to hearing.

⁸³ It also relies in part on the principles established by the British Columbia Court of Appeal in *Zutter v. British Columbia (Council of Human Rights) and Norgal Investments* (1995), 3 B.C.L.R. (3d) 321 (C.A.), leave to appeal denied (1996), 13 B.C.L.R. (3d) xxxiii (S.C.C.). This case turned in part on *functus officio* principles and in part on the interpretation of provisions in the former *Human Rights Act*.

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in eradicating and remedying discriminatory acts. However, it should be recognized that some individual and small business respondents face considerable hardship in trying to defend against human rights complaints that may prove to be unmeritorious.

The increasing length and complexity of human rights hearings in recent years has placed a burden on all parties. In a 1997 case, *Canadian Jewish Congress v. Collins and North Shore Free Press*, for example, the respondents argued that the process was manifestly unfair because they had spent in excess of \$200,000 in legal fees in defending against the human rights complaint. While the protracted nature of that hearing stemmed from the constitutional challenge raised by the respondents (which occupied most of the hearing), the case nevertheless provides an extreme example of the potential costs that can be involved in defending against a claim.

There is a concern on the part of the employer and business community that there is no incentive for true settlement discussions during investigation or mediation because of the absence of any cost consequence to complainants. Complainants who reject reasonable settlement offers only face two potential downsides: (i) the stress and inconvenience associated with participating in the hearing; and (ii) the possibility of the complaint being dismissed or receiving less compensation than the settlement offer. The legal aid funding model also provides a disincentive to complainant's counsel to recommend settlement because they are limited to eight hours of paid preparation time regardless of the amount of time that has gone into preparation of the case. Additionally, legal aid allows only two hours for settlement consultation at the HRC level, which may operate as a further disincentive to early resolution of complaints.

There is a related concern on the part of respondents that they cannot recoup their costs if a complaint is dismissed. The HRT's authority to order costs is limited. Section 37(5) provides that the member or panel may award costs against a party to a complaint that, in the opinion of the member or panel, has engaged in improper conduct during the course of the investigation or the hearing of the complaint. This is a high threshold to meet.

Concern was also expressed that the provision of legal aid for complainants constitutes a waste of public resources when the DCC participates in the hearing to support the complaint. CAHRTS advocates for the elimination of the DCC's "intervention" function in such cases.

The DCC's Advocacy Role

The advocacy role of the DCC has been the focus of criticism by CAHRTS and counsel who represent employer and business groups and others. It is clear from a review of the 1994 Black Report and the Code that the legislature intended the DCC's role in the complaint process to

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focus on representing the broad public interest in the prevention and elimination of all forms of discrimination. The broad public interest was described by one human rights specialist in these terms:

A key message from the very beginning of the adoption of modern human rights laws has been that a violation of an individual's equality rights is more than a mere private wrong. Discrimination wounds the community ... That is because discrimination undermines the very essence of our idea of community: the acceptance of others as people equally deserving of concern and respect, just by virtue of their humanity ... I believe that human rights laws are a tangible sign of this society's commitment to maintain and cement our basic bonds of community, through the promotion and protection of the idea of "belonging". Equality claims begin and end with a desire for belonging, for community, and in Canada, a core element of our idea of community is the idea of equality.⁸⁴

The DCC has the discretion to file a complaint under the Code and to be added as a party to pre-existing complaints. The only limitation on the scope of the DCC's discretion to initiate a complaint or to be added as a party to an existing complaint or hearing is that he must exercise that power in a manner that is consistent with the purposes of the Code. To date, the DCC has not initiated any complaints; instead he has participated in complaints initiated by other individuals or groups. Often, but not always, the DCC supports the position of the complainant. He may take a different legal position from either party or limit his involvement to specific questions of law without taking any position on the merits of the complaint.⁸⁵

The DCC's role has generated confusion on the part of complainants and respondents. The fact that the DCC shares an office with the CIM and CC has led to the perception that the three commissioners do not operate at arm's length from one another. The DCC's participation in hearings has led to the perception that respondents face an array of publicly-funded lawyers in the hearing process because they must not only contend with the evidence and argument of the complainant but also that of the DCC. The concern was expressed that the DCC's participation prolongs hearings because he is focused on systemic issues that, by their nature, are more complex and time-consuming to adjudicate.

The involvement of the DCC in respect of an individual complaint can also lead to tensions between the DCC and the parties to a complaint. In particular, difficulties emerge when the DCC

⁸⁴ W. Pentney, *Words that Wound: Human Rights Proceedings as a Response to Hatred* (unpublished paper presented at the Conference, *Hatred in Canada: Perspectives, Action and Prevention*, Victoria, B.C. September 18, 1998) and quoted by the DCC in Public Interest Program of the B.C. Human Rights Commission, (C.L.E., Human Rights '97).

⁸⁵ This was done, for example, in *Cook v. Citizens Research Institute* where the DCC made submissions on the interpretation of s. 7(1)(a) of the Code without taking any position on the merits of the complaint.

wishes to follow a different path than the complainants. This was illustrated in *B.C. Human Rights Commission v. B.C. Human Rights Tribunal*, 2001 BCSC 721, where the DCC sought judicial review of an HRT decision that it had no jurisdiction to continue a hearing at the request of the DCC in circumstances where the complainant and respondent had reached a settlement. The DCC, who had added himself as a party to the hearing in accordance with s. 36(2) of the Code, objected because the settlement did not address the systemic issues raised by the complaint. Both the complainant and the respondent took the position that the DCC could not take ownership of the complaint and force the parties to participate in a hearing on the merits. The British Columbia Supreme Court upheld the HRT's decision that it did not have jurisdiction to proceed.⁸⁶ This decision has serious implications for the role of the DCC in cases where the parties, to the exclusion of the DCC, settle individual complaints of discrimination raising systemic issues. It effectively means that the dedication of resources on the part of the DCC may be wasted where the complainant reaches a settlement which is limited to the allegations of individual discrimination.

It is understandable that, from the perspective of cost and efficiency, the DCC has opted to exercise his discretion by becoming involved in existing complaints that raise issues of public interest, rather than initiating his own complaints. It is a far more efficient use of resources to participate in an existing complaint than to investigate and gather the necessary evidence to launch a new complaint. It enables the DCC to direct scarce resources to those complaints that have the potential to remove systemic barriers to equality. Additionally, the experience of commissions in other jurisdictions with powers to initiate complaints confirms that the threshold required for commencing a public complaint is considerably higher than the threshold for commencing a private complaint.

However, complainants who achieve a resolution of their individual complaints through settlement may be understandably resistant to participating further in a hearing filed under their name. This issue also highlights the unavoidable tension between the goal of an expeditious resolution to complaints and the increased time needed to pursue complaints involving systemic patterns of inequality. It brings into sharp relief the tension between the individual complainant's wish to control his or her own complaint and the public policy interests in pursuing complaints raising broader systemic barriers to equality.

⁸⁶ This decision is under appeal.

Separation of HRC Functions

One of the criticisms of the former *Human Rights Act* was the lack of separation of roles carried out by the council. The council was responsible for intake and investigation of complaints as well as adjudication of complaints that were ultimately referred to hearing. This created a perception on the part of some respondents that the hearings themselves were influenced by the council's earlier involvement (suggesting that the council was on the side of the complainant). Black noted that this opinion was far from universal, but he expressed concern that this view, however unfounded, could undermine the legitimacy of the process.

Although this concern was addressed by the changes to the Code which conferred responsibility for intake and investigation on the CIM and responsibility for adjudication on the HRT, this separation of powers between the HRC and the HRT has given rise to a new area of concern, namely the perception that the HRC cannot discharge its role in an objective manner because it has education and advocacy roles in addition to its responsibilities for intake, investigation, and dismissal or referral of complaints. The combination of these functions within one statutory agency has led to concerns regarding the HRC's objectivity in processing complaints as well as its objectivity in the discharge of its education function.

Under the present structure, the CIM makes decisions about complaints to which the DCC may be a party. Section 15(8) of the Code directs the CC and DCC not to interfere with or direct the exercise of the CIM's statutory powers. The integrity of the intake and screening process depends in large measure on the perception that the CIM operates in an objective and independent manner since that office will be the initial and often only point of contact for many complainants and respondents. While the legislation provides a clear direction to the CC and DCC to remain at arm's length with respect to dismissal or referral decisions, the practical implications of having separate functions within the same agency are not clear. How does this statutory direction impact on the day-to-day management and administration of the HRC overall?

Aside from the external perceptions of these functions being performed under the umbrella of the HRC, questions logically arise about the appropriateness or propriety of the three commissioners sharing or accessing common space, staff and office equipment. Other questions arise about the appropriateness of developing policies and procedures that address interpretive issues to be applied by all three commissioners. The CC and DCC have statutory mandates and responsibilities that are markedly different from the complaints processing and screening mandate of the CIM. For example, the DCC, in participating as a party to an individual complaint (or as a complainant in his own right), may advocate strongly in favour of a particular

interpretation of a statutory provision that is contrary to the interpretation that is advanced on behalf of the respondent.

The commissioners have recognized the importance of maintaining transparency in their processes and the need to maintain proper records and formal lines of communication, but the real question is whether there is any potential for interference in the decision-making process for dismissal or referral decisions. These decisions were originally made by the CIM or external human rights specialists independent of the HRC acting under delegated authority. In recent years, however, CIM decision-making authority has been delegated to staff managers and, occasionally, other line staff, without instituting proper safeguards to insulate the decision-maker from his or her workplace.

CAHRTS identified as significant concerns the tensions surrounding the roles of the three commissioners within the HRC and the coordination of their responsibilities to achieve overall goals. These concerns appear to stem from the fact that the public positions taken by the CC are sometimes at odds with CIM dismissal decisions or the willingness or unwillingness of the DCC to participate in certain complaints.

Counsel for employer and business groups also raised the concern that the CC has engaged in a disproportionate level of consultation with human rights advocacy groups and insufficient consultation with employer and business groups. Practitioners who represent respondents contend that most employers, who strive to comply with the Code, would benefit from assistance from the HRC on issues such as accommodation; however, they say that the HRC has not been helpful in providing guidance particularly to mid to large size employers. It also does not help that the DCC cannot, under the current scheme, provide any guarantee to respondents in settlements involving systemic change that they will not be subject to further complaints.

There is a high level of distrust between the employer community and the HRC. This problem is exacerbated by the HRC's dual mandates for education and advocacy. The employer and business community believe that the HRC's efforts to connect with them have fallen short and their views are not being heard.

Finally, the point has been made that the CC's highly public and sometimes controversial human rights advocacy stance has left the HRC in particular, and the system generally, more vulnerable to public (including media) scrutiny and criticism than would otherwise be the case.

The HRT Hearing Process

We will not address concerns regarding the substance of some HRT decisions and the substantive provisions of the Code as these are beyond the scope of our mandate. Instead, we will focus on the concerns expressed to us with respect to the HRT's hearing process.

There is ongoing concern regarding the protracted length of some hearings before the HRT. There is a perception that the HRT extends greater latitude to parties to introduce evidence than would be the case in court proceedings. Like any administrative tribunal, the HRT is not bound by the formal rules of evidence that govern judicial proceedings. However, concern was expressed that there should be more limits on the introduction of evidence to control the hearing process.

There is a significant concern that hearings are side-tracked by judicial review applications, particularly in the context of constitutional issues. An example of this is the case of *Westbank First Nation v. Bersheid*, discussed in some detail in Chapter VII. The respondent filed a judicial review challenging the HRT's jurisdiction. On appeal, the matter was converted to an action for declaratory relief. Faced with the prospect of a long constitutional hearing in the Supreme Court, the Westbank First Nation opted to withdraw its complaint, rendering the entire proceeding moot. Complainants, faced with the prospect of a lengthy hearing, may choose to withdraw their complaints.

Concerns were also expressed with respect to the institutional competence of the HRT to provide adequate remedies to deal with systemic complaints of discrimination raising issues of broad public policy. Generally speaking, these concerns arise with respect to complaints regarding the delivery of services by public/governmental bodies. Practitioners who represent such bodies maintain that cases of true systemic discrimination would more appropriately be dealt with as s. 15 challenges under the *Charter* with all of the attendant protections available in court proceedings.

Although the HRT has comprehensive rules of practice and procedure for pre-hearing matters, many felt that it would be beneficial to have examination for discovery and a summary process for dealing with complaints to give parties the option of bypassing a lengthy and expensive hearing process. Practitioners also expressed concern regarding the HRT's inability to order costs against a party except in the most extraordinary circumstances, or to dismiss complaints in circumstances where the complainant unreasonably refuses to accept a settlement offer.

CHAPTER VI: PARALLEL OR MULTIPLE PROCEEDINGS

Another area of concern that raises cost and efficiency issues relates to the crossover in jurisdiction between the HRT and other adjudicative forums. There are circumstances where the subject matter of a human rights complaint also forms the basis for, or an integral part of, a claim, complaint, action or grievance under other internal, statutory or judicial processes. The potential for parallel, sequential and even multiple proceedings involving human rights issues most often arises in relation to workplace disputes, although it can arise in other contexts as well. These proceedings are sometimes engaged concurrently and sometimes consecutively. The availability of more than one forum for the adjudication of discrimination allegations gives rise to concerns relating to the time, expense and uncertainty involved in relitigating what are essentially the same issues. In some cases, the process before one tribunal will be deferred pending the disposition of the other. While deferral can ultimately prevent the relitigation of identical or like issues, it still raises concerns of delay, cost and uncertainty. Since early resolution is particularly important where ongoing relationships are involved (as in an employment context), a lack of finality and certainty may cause further damage to those relationships. Parallel or multiple proceedings raising the same issues also raise broad fairness concerns.

Background

The problem of general subject matter overlap between workplace tribunals and resulting duplication was the subject of extensive consideration by the Ontario Law Reform Commission (Ontario LRC) in its *Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes*. The Ontario LRC describes the problem of multiple proceedings generally:⁸⁷

Multiple proceedings arise when parties take advantage of the fact that the jurisdiction of a number of administrative tribunals overlap and bring successive complaints to different tribunals. As a result of this practice, the resources of a number of tribunals have to be marshaled to resolve what is essentially one dispute⁸⁸ ...

...

It is in the best interests of employers, and the public that workplace disputes be resolved quickly, efficiently, and inexpensively. For this reason, administrative tribunals have been assigned tasks that otherwise would have been referred to the courts. However, some of the advantages that these tribunals have over

⁸⁷ Ontario LRC Report, at page 173.

⁸⁸ Ontario LRC Report, Executive Summary, page 1.

courts – their speed and their cost – are compromised when multiple proceedings are permitted.⁸⁹

Similarly, the La Forest Panel acknowledged⁹⁰ that:

... Re-litigation uses up expensive quasi-judicial resources. It may also produce inconsistent decisions which could cause confusion about what employers and service providers are expected to do to comply with the Act. Multiple proceedings can contribute to delay and are very expensive. They can also frustrate the remedial goals of human rights legislation by bringing a case before decision-makers who cannot order the appropriate remedy.

At common law, issues concerning the relitigation of the same claim or same issue are largely comprehended by the doctrine or principle of *res judicata*, (which includes the doctrines of issue estoppel and cause of action estoppel).⁹¹ These doctrines, which recognize the importance of finality of litigation to our legal system, are intended to promote the orderly and fair administration of justice. Their underlying purpose is "to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case"⁹² and to balance the corresponding private interests:

¶33 *Res judicata* and related principles which operate to preclude relitigation of decided issues are Judge-made doctrines. They reflect a balancing of fairness and finality concerns, both of which are fundamental to the maintenance of the rule of law and the effective administration of justice.⁹³

Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be a tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.⁹⁴

In *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46 (Q.L.), the Supreme Court of Canada considered the public policy doctrine of issue estoppel and its application to

⁸⁹ Ontario LRC Report at page 137.

⁹⁰ La Forest Report, at page 89.

⁹¹ These doctrines were succinctly described by the La Forest Panel as "legal rules meant to prevent a tribunal from re-deciding the same issue placed before it by the same parties or where the earlier decision was final, to prevent re-litigation of the whole case".

⁹² *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46 (Q.L.) at ¶33.

⁹³ *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2001] O.J. No. 3239 (C.A.) (Q.L.)

⁹⁴ *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.) at p. 340.

administrative tribunals. The issue there was whether a dismissed employee, having filed a claim against her employer for unpaid wages and commissions under employment standards legislation, should be precluded from relitigating the question of her entitlement to make the same claim in a wrongful dismissal action. The employment standards officer had dismissed her claim and the employee did not pursue a review of this decision. Instead, she pursued her wrongful dismissal action. Binney J. (speaking for the Court) described the public policy objectives underlying the doctrines of *res judicata*, issue estoppel and cause of action estoppel, and the related collateral attack doctrine:

¶18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided ...

¶20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine of estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation ... The bar extends to both the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel) ... Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided for the express purpose of attacking it ...

¶21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

In a similar vein, the Ontario Court of Appeal considered these doctrines in an administrative tribunal context in *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2001] O.J. No. 3239 (C.A.) (Q.L.). This case concerned arbitration proceedings under a collective agreement. The grievor had been convicted of sexual assault of a young boy in criminal proceedings. Following his conviction, the grievor was dismissed from his employment due to the work-related nature of his criminal conduct. He grieved his dismissal and the union maintained before the arbitrator that the grievor did not sexually assault the youth. The arbitrator declined to apply the doctrine of issue estoppel. He held that "it was not an abuse of process under the collective agreement and *Labour Relations Act* for the grievor to maintain, in these proceedings,

that he did not do things that he was found to have done in the other proceedings".⁹⁵ The Court found that the arbitrator erred in law in permitting the union to relitigate the grievor's culpability. In reaching this conclusion the Court commented extensively on the policy considerations underlying the relevant legal principles:

¶73 When a controversy arises over a parties' right to relitigate a decided issue, important principles that are at the core of the due administration of justice clash. Parties who seek to relitigate stress their "right" to a decision on the merits made after they have had a full opportunity to present their case before the tribunal charged with the responsibility of rendered a decision. Those who resist relitigation assert their "right" to rely on the previous determination. All parties insist that "justice" is achieved by the position they assert.

¶74 The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

¶75 From the perspective of the party who seeks to relitigate, that relitigation will serve to correct, at least to some extent, the failure of justice in the initial proceeding. Parties who seek to relitigate will sometimes point to procedural and substantive failures of justice in the first proceeding as justification for relitigation ...

¶76 Justice, must of course, look through a much broader lens than that worn by the party who seeks to relitigate. Other interests, including those of the previously successful litigant, those collaterally affected by the proposed relitigation (e.g., witnesses), the institutions responsible for controlling and administering the adjudicative process, and the community at large, are all affected when an issue that has been finally decided is relitigated. To those interests, finality is a central feature of justice and to the extent that relitigation uproots finality, it invites injustice. This is so whether the relitigation occurs in the same forum as the first adjudication, or in a different forum.

¶77 In deciding whether to permit relitigation, a Court or tribunal must decide whether finality concerns should outweigh an individual litigant's claim that the justice of the specific case warrants relitigation. That determination is fact-specific and requires that the Court or tribunal weight those competing considerations in the context of the facts of the particular case. Not all relitigation compromises finality concerns to the same extent and finality is not as important in some facets of the law as in others. Similarly, a claim that the justice of the individual case requires relitigation is much stronger in some situations than in others ...

¶79 Finality is essential to the maintenance of a fair and effective adjudicative process. The values it serves are fundamental to that process and to the community. Firstly, relitigation raises the spectre of inconsistent results. Such results create a myriad of problems for those involved in the proceedings, including, but not limited to those

⁹⁵

At ¶12.

arising from attempts to enforce conflicting orders. Inconsistent results are also capable of bringing the administration of justice into disrepute in the eyes of reasonable and well informed members of the community. In this case, the conflicting results arrived at in the criminal proceedings and in the arbitration would, in my view, cause reasonable persons to wonder about the rationality of the adjudicative process.

¶80 Secondly, relitigation diminishes the overall authority of the adjudicative process. What value is a result if that result can be challenged and relitigated in another forum at any time? Thirdly, relitigation breeds uncertainty. How can those drawn into the adjudicative process determine when they have reached the end of that process, get on with the rest of their lives and arrange their affairs in reliance on the decisions reached in that process? Finally, relitigation drains individual and institutional resources. Neither individuals, nor the community as a whole, have the resources or the lifespan required to permit the continual relitigation of decided issues.

¶81 In emphasizing the importance of finality, I do not pretend that the decision made in the first proceeding is always correct. It must, of course, be observed that relitigation is not a guarantee of a more accurate result. The simple truth is that finality is so essential that it is routinely given priority over the possibility that relitigation would achieve a more accurate result. The importance of finality is best seen in those cases where finality has trumped individual constitutional rights ... In those cases, even the decision is wrong in the most important sense in that it denies someone a fundamental right, the Courts have held that finality precludes relitigation. A desire to avoid the harm caused by permitting relitigation is given paramountcy over the rights of the individual and the accuracy of the result in the particular case.

It is well established that the principles of issue estoppel and cause of action estoppel are discretionary and are not to be mechanically applied.⁹⁶ Nor are they to be applied "at the cost of real injustice in a particular case". The list of factors to be taken into account in exercising the residual discretion to apply them is not closed and includes:

- the wording of the statute from which the power to issue an administrative order derives;
- the purpose of the statute;

⁹⁶

In *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2001] O.J. No. 3239 (C.A.) (Q.L.) at ¶97, the Ontario Court of Appeal noted that a feature of the *res judicata* jurisprudence is the "Court's willingness to preclude relitigation in circumstances which do not quite come within the *res judicata* criteria, but in which the policy considerations barring relitigation operate as strongly as they do in cases captured by the *res judicata* doctrine". Thus the Court determined that the "fact that CUPE is not a party to the criminal proceedings is of no consequence in assessing the [relevant] competing values". (Identity of parties is one of the elements traditionally associated with the *res judicata* doctrine.) In another case, *Schweneke v. The Queen*, [2000] O.J. No. 298 (C.A.) (Q.L.), the Court upheld the application of issue estoppel to a constructive dismissal action on the basis of a finding by an Umpire under the *Unemployment Insurance Act*, R.S.C., 1985, c. U-1, that the employer had cause to dismiss the plaintiff due to misconduct. The Court reinforced the fact that a mechanistic application of the principles could work an injustice and noted that proceedings before administrative tribunals are summary in nature and designed to provide a speedy resolution to specific, relatively modest statutory claims. However, it is not enough to demonstrate that the full panoply of procedural protections available in civil litigation; nor can a party rely on general fairness concerns which exist whenever the finding relied on emanates from a tribunal whose procedures are summary and whose tasks are narrower than those used and performed by the courts.

- the availability of an appeal;
- the expertise of the decision-maker;
- the circumstances giving rise to the prior administrative proceedings; and
- the potential injustice to a party.⁹⁷

The way in which these principles have been applied by human rights tribunals is touched on below.

Proceedings That Raise Human Rights Issues

It is possible for an individual to simultaneously or consecutively commence proceedings that raise human rights issues in a number of different forums. For example, allegations of sexual harassment in the workplace could simultaneously be the subject of a grievance under a collective agreement, a complaint under the Code, a complaint under the *Ombudsman Act* and a complaint under employer internal anti-harassment policies and procedures. Over the last decade, an increasing number of complaints have been filed under the Code that either are or have been the subject of another dispute resolution process.⁹⁸ It is instructive to consider the ways in which the potential for duplication in the adjudication of human rights issues arise.

Overlap in a Workplace Setting

A number of Code provisions regulate workplace discrimination issues.⁹⁹ In particular, s.11 prohibits discrimination in employment advertisements, s. 12 prohibits discrimination in wages and s. 13 prohibits discrimination in employment. In 2000/01, 77% of the cases closed by the CIM were employment-related and 81% of the referrals to the HRT were employment-related.

The subject matter of complaints under ss. 11, 12 and 13 of the Code may overlap with the subject matter of other proceedings in a number of ways. The Ontario LRC made the following observations with respect to subject matter overlap between workplace tribunals:¹⁰⁰

⁹⁷ *Danyluk, supra*, at ¶¶67-80. Ultimately the Court determined that the application of the doctrine of issue estoppel in all of the circumstances of the case would work a real injustice to the plaintiff.

⁹⁸ This point was made by CIM lawyer, Thomas F. Beasley, in his CLE article, *The Human Rights Commission: The Complaint Investigation System* (CLE Human Rights – 2000 Update).

⁹⁹ The Tribunal is not properly characterized as a "workplace tribunal" because its jurisdiction is not limited to employment-related subject matter. A large percentage of the complaints coming before it for adjudication, however, raise employment discrimination issues (approximately 75-80%).

¹⁰⁰ Ontario LRC Report at pp. 80-81.

Overlapping jurisdiction is not a problem per se; in fact, in many circumstances it provides litigants with a number of advantages. For example, a complainant may choose to bring a complaint within a particular regime because it may be resolved more quickly, or more slowly, than in another regime, or because its jurisprudence shows that the complainant will have a greater chance of success there than elsewhere.

Despite these benefits, overlapping workplace jurisdictions may give rise to problems such as multiple proceedings. As long as a factual issue involves a number of different regimes of employment law, the parties are free to institute multiple proceedings in order to ensure that the fact situation has been considered from all legal perspectives ...

... the existence of the problem has been recognized by a number of authorities. For example, in a Ministry of Labour Report, the following comment was made:

A multiplicity of legal and administrative proceedings is an increasing problem for employers under collective bargaining arrangements. The same factual circumstances can lead to proceedings under the collective agreement, before the Labour Relations Board, under the Human Rights Code and potentially under other statutes such as the Employment Standards Act, the Workers Compensation Act and the Ombudsman Act.

Moreover, it is possible to find a number of examples where multiple proceedings exist in the case law.

To the extent that this problem exists, it is clear that it detracts from the usefulness and efficiency of the administrative process. When multiple complaints are brought to resolve one workplace problem, both the public and the concerned parties incur an increased expenditure in terms of both money and time. As a result, the primary attraction of having administrative tribunals deal with workplace issues – their speed and economy – is diminished. Moreover, the multiplicity of proceedings has a detrimental impact on the employer/employee relationship. In certain circumstances, multiple proceedings may also give rise to conflicting decisions.

Given the existence and the detrimental effect of this situation, therefore, it becomes necessary to determine why it continues to exist. There appear to be three causes. First, many administrative adjudicators do not have the authority to consider laws external to their constitutive legislation. Second, there are situations where, even when such authority exists, an adjudicator may fail to exercise that authority. Finally, even if the authority to consider external law exists and is exercised, a decision taken by one adjudicator may not be respected by others ...

Grievance Procedures

Grievance procedures offer the most common example of another forum for the adjudication of human rights issues.¹⁰¹ Many, if not most, collective agreements contain provisions incorporating human rights legislation or principles. Many contain specific procedures for dealing with sexual or personal harassment. In such cases, allegations of employment discrimination can form the basis of both an employee grievance under the collective agreement and a human rights complaint under s. 13 of the Code.¹⁰² Even in the absence of such an express contractual provision, there has been a recognition that labour arbitrators can consider and apply human rights principles. For example, in *U.S.W.A., Local 7884 v. Fording Coal*, [1999] B.C.J. No. 2109 (C.A.) (Q.L.) at ¶2, the British Columbia Court of Appeal observed that:

[a]ll parties represented on these appeals agreed an arbitrator chosen by the parties to a collective agreement to resolve a labour dispute has the authority and the obligation to interpret and apply the Human Rights Code in reaching a decision or making an award, whether or not adherence to the Human Rights Code or its principles is included as a term of the collective agreement. They also agree the provisions of the Human Rights Code override those of the collective agreement.

This ability to pursue both avenues is a relatively recent development. As one writer explained:

Even within the context of the development and evolution of human rights issues as an area at the forefront of the employment relationship, the question of whether employees in a unionized workplace can pursue a discrimination or harassment complaint through both the grievance procedure in the collective

¹⁰¹ This is not surprising given the range and type of provisions typically found in collective agreements and the broad range and nature of the prohibitions listed in the *Human Rights Code*.

¹⁰² See also, Andrea L. Zwack, *Some Issues in the Interaction of Human Rights and Labour Law Processes* (C.L.E., Human Rights '97): "In the context of unionized employers specifically, the majority of collective agreements negotiated today contain clauses expressly referencing or incorporating the provisions of the *Human Rights Code* prohibiting discrimination on enumerated grounds. While the particular content of the harassment policy and the processes adopted for dealing with complaints may be contentious as between union and management, the view that language prohibiting discrimination should be included in the collective agreement and should govern relations in the workplace is rarely so. This development is admirable and is to be promoted. However, the inclusion of such language in collective agreements renders instances of harassment and discrimination on prohibited grounds grievable matters under the collective agreement in addition to being grounds for a complaint to the Human Rights Commission. Arbitrators, to an ever increasing degree, are being called upon to adjudicate complaints which fundamentally, do not involve the interpretation of the collective agreement bargained between the parties so much as the interpretation and application of the *Human Rights Code* and related jurisprudence. In turn, this result raises a number of issues of both procedure and substance which impact on the parties to a collective bargaining relationship and on the operation of the statutory scheme governing the development, interpretation and advancement of human rights law and policy in the province. These include, among others, the following two important issues: (a) The ability of complainants to pursue both a human rights complaint and a grievance under the collective agreement; and (b) Where does one appeal the decision of an arbitrator with respect to a human rights issue?"

agreement and the human rights tribunal is an issue of relatively recent origin. This is because until fairly recently, many arbitrators were of the view that human rights legislation did not apply to the terms of a collective agreement and/or that to the extent that it did, arbitrators were without jurisdiction to interpret and apply the provisions of the Human Rights Code. Thus, to the extent that a grievance involved allegations of discrimination contrary to human rights legislation, the arbitrator's jurisdiction was limited to deciding the issue without reference to such considerations.

However, this view has changed, largely as a result of the Supreme Court of Canada's decision in *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202, in which the Court held that all collective agreements were subject to the applicable human rights legislation, and to the extent that a collective agreement purported to shield itself from the application of such, it constituted an illegal attempt to contract out of human rights legislation.

Subsequent to the Supreme Court of Canada's decision, the majority of collective agreements being entered into in British Columbia began to provide expressly that discrimination or harassment in the workplace on a ground contained in the Human Rights Code was prohibited and became grounds for a grievance under the collective agreement. As a result, employees covered by a collective agreement now have, in most instances, two avenues by which they can pursue a claim of discrimination, that is, the grievance procedure under a collective agreement and a complaint to the Human Rights Commission.¹⁰³

Another writer¹⁰⁴ summarized the developments from a labour relations perspective this way:

Over the past two or three decades, there has been a pronounced shift of emphasis within our system of labour law. Collective rights, worked out at the bargaining table, are relatively less important than they used to be. To a degree, they have been upstaged by what I would call particularistic rights – equality rights of diverse groups identified on the basis of factors such as gender, ethnicity, and disability. The symbolic importance of these particularistic rights has been greatly enhanced by the Canadian Charter of Rights and Freedoms, but most of their penetration into the workplace has not been due to the Charter but to the anti-discrimination provisions of human rights legislation. Since the landmark judgment of Laskin C.J. in *McLeod v. Egan*, [1975] 1 S.C.R. 517 (S.C.C.), arbitrators have had to take account of statutes (including human rights statutes) in adjudicating grievances under collective agreements. Canadian labour law in the past quarter century has probably been marked more by the continuous attempt to come to terms with the implications of *McLeod v. Egan*¹⁰⁵

¹⁰³ Andrea L. Zwack, *Some Issues in the Interaction of Human Rights and Labour Law Processes* (C.L.E., Human Rights '97).

¹⁰⁴ Law Professor Bernie Adell, in his article, *Labour Arbitration v. Human Rights Code* (CLE Human Rights: Disability Issues 1999).

¹⁰⁵ Professor Adell writes that, in that case, "Laskin C.J. said that an arbitrator could and indeed must refuse to enforce collective agreement provisions which flew in the face of statutory prohibitions ([1975] 1 S.C.R. 517). Thus because Ontario employment standards legislation prohibited compulsory overtime in circumstances where the collective agreement allowed it, the arbitrator was required to apply that legislation and to disregard the offending clause in the agreement".

than by all of the pyrotechnics over anti-strikebreaker legislation and other traditional high profile issues.

A complicating factor arises where a provision of the collective agreement is alleged to be the source of discriminatory treatment. In such cases, both the union (which represents grievors at arbitration) and the employer, having jointly negotiated the contract, are parties to discrimination that arises from the application of one of its terms. Examples of where facially neutral contract terms are the subject of discrimination claims in arbitration proceedings are provided in the Ontario LRC Report:¹⁰⁶

... there are many situations where neutral terms of the agreement can be applied in a discriminatory fashion. Claims of discrimination can arise at almost any stage of the employment relationship. In the past, claims have been made in the areas of educational upgrading [e.g., Re Province of Saskatchewan and S.G.E.U. (1986), 25 L.A.C. (3d) 1 (Sask.) (age discrimination)], transfer [e.g. Re Wentworth County Board of Education and C.U.P.E., Local 1572 (1984), 14 L.A.C. (3d) 310 (Ont.) (disability-based discrimination)], promotion [e.g. Re Varta Batteries (St. Thomas) and C.A.W., Local 2168 (1987), 26 L.A.C. (3d) 397 (Ont.) (religious discrimination)], work schedules [e.g. Re City of Winnipeg and C.U.P.E., Local 500 (1985), 22 L.A.C. (3d) 332 (Man.) (sex discrimination)], employment benefits [Re Carleton University and C.U.P.E., Local 2424 (1988), 35 L.A.C. (3d) 96 (Ont.) (discrimination based on sexual orientation)], manager/employee relations [e.g., Re Canada Post Corp. and C.U.P.W. (1983), 11 L.A.C. (3d) 13 (Can.) (sexual harassment)], disciplinary action [e.g., Re Government of the Province of Alberta and A.U.P.E. (1982), 5 L.A.C. (3d) 268 (Alta) (sexual harassment); Re Steinberg Inc. Miracle Food Mart Division and Teamsters Union, Local 419 (1986), 23 L.A.C. (3d) 193 (Ont.) (disability-based discrimination)], recall [Re Pelton Reforestation Ltd. and I.W.A., Local I-367 (1988), 33 L.A.C. (3d) 40 (B.C.) (age and sex discrimination)], discharge [e.g., Re Canada Cement Lafarge Ltd. and E.C.W.U., Local 219 (1986), 24 L.A.C. (3d) 202 (Ont.) (sexual harassment)], and retirement [Re Westroc Industries Ltd. and C.L.G.W., Local 400 (1982), 3 L.A.C. (3d) 168 (B.C.) (age discrimination)]. Where such instances occur, the employee has a right to grieve under the collective agreement or to make a complaint to the Human Rights Commission.

The human rights jurisprudence is clear that both the employer and the union have a duty to accommodate an employee who is adversely impacted by a discriminatory workplace rule incorporated into a collective agreement.¹⁰⁷ Accordingly, in human rights proceedings, where discriminatory contract terms are at issue, the union is properly named as a co-respondent to the complaint.¹⁰⁸ Additionally, a union might attract liability for its failure to comport with its duty to accommodate if it impedes the employer's attempts to accommodate a bargaining unit employee.

¹⁰⁶ Ontario LRC Report at pages 66-7.

¹⁰⁷ Central Okanagan School District, No. 23 v. Renaud, [1992] 2 S.C.R. 970.

¹⁰⁸ The law is clear that parties cannot contract out of the provisions of human rights legislation: Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145 at p. 158; Etobicoke, *infra*, at p. 213; Winnipeg School Board v. Craton, [1985] 2 S.C.R. 150.

Human Rights Review

A Background Paper for the Administrative Justice Project

Since the union (not the grievor) has control of the grievance, there is a potential conflict between the individual grievor's interests and the union's obligation to represent all members of the bargaining unit and its human rights duty to accommodate individual members of that bargaining unit. The La Forest Panel described the grievor in these circumstances as being a "victim at the mercy of the two parties" (i.e., the union and the employer).

The concerns most frequently expressed by employers about duplication between grievance arbitration and human rights processes relate to the associated time, cost and uncertainty. From the union perspective, such overlap creates:

... a myriad of problems for trade union lawyers and business representatives. In a case which exhibits both a human rights component and a non-human rights component, is it better to arbitrate the non-human rights component and have the grievor file an individual human rights complaint, or, because an arbitration is likely to result in a higher level of "damages" than a human rights complaint, is it better to attempt to argue the human rights component through the grievance arbitration process? In the Tozer case, counsel for the Province argued that the decision of the Supreme Court in Weber, [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583 mandates that the Human Rights Tribunal must allow the human rights component of the case to go to arbitration. However, the judgment of the B.C. Supreme Court found that the Human Rights Tribunal is to make the decision on the human rights component, not an arbitrator.

This would seem, on a purely principled level, to be the right decision: a tribunal acts in the public interest, whereas an arbitrator only interprets the collective agreement. However, the union can face an intractable situation where it believes it can settle the non-human rights aspect of the complaint, but not the human rights complaint. Another issue arises in such circumstances: can a grievor "veto" a decision settling his grievance where it has a human rights component, and therefore, could be the subject of a human rights complaint to the Human Rights Tribunal? With no human rights component, the union has a final say over whether a grievance is settled. Does this also apply when there are human rights and non-human rights issues involved?

*... It appears as though further judicial pronouncements will be necessary before unions and their counsel can say with any confidence what is appropriate conduct when dealing with complaints which may involve a human rights aspect.*¹⁰⁹

Employment Standards Act

Section 54 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, prohibits an employer from either dismissing an employee because she is pregnant or changing a condition of her employment without consent. Section 13 of the Code prohibits employment discrimination based

¹⁰⁹

Donald W. Robert, *Union's Duty of Fair Representation* (CLE Human Rights – 2000 Update).

on sex (which includes pregnancy). A pregnant employee who has been dismissed or whose work conditions have been unilaterally altered may file complaints under s. 74 of the *Employment Standards Act* and s. 13 of the Code. Similarly, ss. 50 and 51 of the *Employment Standards Act* make specific provision and entitlement for pregnancy and parental leave. Ontario employment standards legislation contains similar provisions. Of these, the Ontario LRC observed:

... Although [the Ontario Employment Standards Act] provides certain benefits that may not be available to employees under the Human Rights Code – for instance, that the Code does not prescribe this leave but only prohibits discriminatory treatment – there are many instances where an employee may have recourse to both enactments.

*The most obvious example may be where an employer does not provide any leave for a pregnant employee before the expected birth even though other employees are permitted health-related leaves. In such an instances, the employee will have recourse under the Employment Standards Act and the Human Rights Code.*¹¹⁰

A significant number of human rights complaints overlap with the subject matter of employment standards complaints. For example, in the fiscal year 2000/01, eighty-one pregnancy-related complaints were accepted by the CIM. In order to address some of the inefficiencies arising because of a subject matter overlap, the HRC and the Employment Standards Branch (ESB) entered into a Memorandum of Understanding (MOU) on November 6, 2000, aimed at minimizing costs, avoiding duplication and achieving consistent decisions. The MOU sets out a process for identifying and dealing with parallel subject matter complaints so as to minimize duplication in the utilization of resources. It also establishes a joint HRC and ESB team to:

- supervise complaint intakes and investigations covered by the MOU;
- maximize cost and administrative efficiencies for the intake and investigation of complaints under the ESA and the HRC;
- create and implement joint public educational initiatives under the ESA and the HRC;
- train individuals for the intake and investigation of complaints under the ESA and the HRC;
- monitor the effectiveness of communication between the ESB and the HRC and recommend improvements to the Director and CIM;
- report regularly to, and receive direction from the Director and the CIM on their activities.

¹¹⁰

Ontario LRC Report at pp. 78-9.

Wage Discrimination

Where the employee alleges sex discrimination against his or her employer in respect of payment of wages, that employee may commence an action in the British Columbia Supreme Court¹¹¹ or file a complaint under ss. 12 and 13 of the Code. Section 12(1) provides that an employer: "... must not discriminate between employees by employing an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work". Section 12(5) provides:

(5) If an employee is paid less than the rate of pay to which the employee is entitled under this section, the employee is entitled to recover from the employer, by action the difference between the amount paid and the amount to which the employee is entitled, together with the costs, but

- (a) the action must be commenced no later than 12 months from the termination of the employee's services, and
- (b) the action applies only to wages of an employee during the 12 month period immediately before the earlier of the date of the employee's termination or the commencement of the action.

In *Vancouver (City) v. Reid*, *supra*, the word "action" in s. 12(5) has been interpreted to mean court proceedings and not proceedings before the human rights tribunal. Accordingly, a person may commence a civil court action in respect of sex-based wage discrimination. Saunders J. also considered the question of whether the Court's jurisdiction over sex-based wage discrimination was exclusive, or whether the legislation provided for dual avenues of redress. She concluded that an employee alleging sex-based wage discrimination can elect to pursue a remedy under either the equivalent of s. 12(5) (*i.e.*, by court action) or s. 13 (*i.e.*, by complaint alleging contravention of a provision of the Code):

¶58 Section 7(5) [now 12(5)] is unusual in the context of human rights statutes, for it includes within the enforcement scheme of the Act access to the court process. Without such an express provision, a person alleging sex-based wage discrimination would have no right to sue in court based solely on breach of the Act: *Bhadauria*, *supra*. However, there is no strict prohibition on actions in court which may parallel a complaint under human rights legislation: *McKinley v. B.C. Tel and others*, [1996] B.C.J. No. 982 (1 May 1996), Vancouver C952949 (B.C.S.C.); *Lehman v. Davis* (1993), 1 C.C.E.L. (2d) 15 (Ont. G.D.); *Biron v. Kashuba et al*, [1996] B.C.J. No. 125 (18 January 1996), Prince George 30484 (B.C.S.C.). Although these latter cases refer to claims in which a cause of action is asserted independent of the basis of the human rights complaint, they illustrate the court's recognition that a person may have more than one avenue of redress available to her or him.

¶59 In this case, there is nothing, in my view, inherent in the *Human Rights Act* which precludes dual avenues of redress. In this unusual provision the legislation has

¹¹¹ That employee could also file a complaint under sections 12(1) and 21 of the Code.

permitted a person to start a court action to remedy a specific type of discrimination, opening the allegation to the swift and summary procedures available to a litigant in court proceedings which may be appropriate for certain claims under section 7 [now section 12]. It is significant that this provision permitting court proceedings was enacted in 1973, when the human rights legislation in British Columbia was amended to increase protection from discrimination and to expand the remedies available to a complainant. I consider that adding the additional avenue of redress of court action for sex-based wage discrimination accorded with the general scheme of the legislation as reflected in the *Human Rights Code*. In contrast, amending the avenues of redress for sex-based wage discrimination by assigning it exclusively to the court would not have accorded with the general scheme of the Code.

¶60 I am bolstered in this view by section 8 of the *Interpretation Act* which instructs the court to give every enactment a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects", and those many cases such as *U.B.C. v. Berg, supra*, which emphasize the unique nature of human rights legislation.

¶61 No rule of law or interpretation prevents legislation from providing dual remedies to a person. On the other hand, human rights legislation is legislation of a special nature, intended to be remedial.

The Court concluded that the HRT and the Court both have jurisdiction over allegations concerning sex-based wage discrimination. It is thus possible to both file a complaint and initiate litigation based on an alleged contravention of s. 12 of the *Human Rights Code*.

Wrongful/Constructive Dismissal

Where a non-union employee has been dismissed from employment, either wrongfully or constructively, for reasons that the employee believes include a prohibited ground of discrimination (i.e., sexual harassment), the employee may file a human rights complaint alleging discriminatory dismissal. That employee could also commence an action for wrongful dismissal or pursue statutory remedies under the *Employment Standards Act*.

Workers' Compensation Act

Where a worker has been injured on the job, the worker is entitled to compensation for injuries as well as treatment, rehabilitation and training under the *Workers' Compensation Act*. Subject matter overlap in tribunal adjudication does not arise because *Workers' Compensation Act* proceedings do not generally engage considerations of human rights issues. However, a lack of integration of the two schemes can be problematic.

For example, the Workers' Compensation Board (WCB) may determine that an employer is not obligated to re-employ a worker because of the worker's disability. In making such a determination, the WCB is not required to take into account the types of factors that inform an employer's duty to accommodate disabled workers under the Code. Consequently, an employer

who relies on a WCB decision as the basis for dismissing a disabled employee may thereafter be faced with a grievance proceeding or human rights complaint (or both) in which the employee claims that the employer failed to discharge its human rights duty to accommodate the disabled employee to the point of undue hardship.¹¹²

Finally, while it does not engage subject matter overlap, the HRT does have a general oversight function in relation to the WCB in its role as a service-provider for purposes of s. 8 of the Code.¹¹³

Internal Employer Anti-Discrimination Policies and Procedures

It is common for employers to establish anti-discrimination policies and procedures as a means for preventing discrimination in the workplace and dealing with complaints where discrimination occurs. As one practitioner noted:

*To a significant extent, the prohibitions against discrimination on the various grounds set out in the Human Rights Code have become norms of behaviour in our society and in our workplaces. Employers, whether union or non-union, adopt sexual harassment and anti-discrimination policies for their workplaces, not simply because they perceive there to be a legal requirement to do so or because it may reduce their potential liability for discriminatory actions undertaken by their employees, but because they are fundamentally opposed to discriminatory and harassing conduct taking place in their workplace.*¹¹⁴

Accordingly, where an employee suffers discriminatory treatment in the hands of a co-worker or manager, that employee may be able to pursue remedies through internal workplace policies and procedures established by the employer and may also file a human rights complaint of discrimination in employment under the Code.

Overlap in Non-workplace Settings

Post-Secondary Educational Institutions

Section 8 of the Code, which deals with discrimination in accommodation, services or facilities customarily available to the public, applies to the educational services provided by universities and colleges.¹¹⁵ Internal policies and procedures for dealing with discrimination allegations are common in post-secondary educational institutions. For example, the University of Victoria has an

¹¹² See for example, *Re Air Canada and International Association of Machinists and Aerospace Workers* (1998), 74 L.A.C. (4th) 233 (Canada).

¹¹³ See, for example, *British Columbia (Workers' Compensation Board) v. British Columbia (Council of Human Rights)* (1990), 47 B.C.L.R. (2nd) 119 (C.A.).

¹¹⁴ Andrea L. Zwack, *Some Issues in the Interaction of Human Rights and Labour Law Processes* (CLE Human Rights '97).

¹¹⁵ *U.B.C. v. Berg* (1993), 18 C.H.R.R. D/310 (S.C.C.).

Office for the Prevention of Discrimination and Harassment and extensive policies and procedures for dealing with discrimination complaints. University students and university employees can make complaints under these policies and procedures (which include adjudication procedures) as well as file discrimination complaints under the Code.¹¹⁶

Discrimination by Trade Unions, Employer Organizations and Occupational Associations

Section 14 of the Code prohibits discrimination by trade unions, employer organizations and occupational associations, including exclusion, expulsion or suspension based on a prohibited ground. Thus the HRT exercises a broad oversight jurisdiction over these types of associations. This was confirmed by the *British Columbia Court of Appeal in British Columbia (Council of Licensed Practical Nurses) v. British Columbia (Council of Human Rights) and Mans*, [1993] B.C.J. No. 371 (C.A.) (Q.L.). In that case, the Council of Licensed Practical Nurses denied the complainant a licence because of her criminal record. In reaching its conclusion, it considered the established human rights criteria applicable in such cases. The complainant filed a human rights complaint. Following a hearing, the Human Rights Council held that the Council of Licensed Practical Nurses had discriminated against the complainant contrary to s. 14 when it refused to issue her a licence. The Court of Appeal, in upholding the human rights decision, observed (at ¶10) that:

... the statutory licensing or certification powers of self-governing professions are not immune from review by the Human Rights Council if those powers are exercised in contravention of the prohibitions described in sections 8 and 9 of the *Human Rights Act*.

Such oversight or supervisory powers do not raise issues of subject matter overlap between two statutory tribunals of the type under consideration here. However, the Labour Relations Board has extensive regulatory oversight powers over trade unions including oversight over compliance with a union's s. 12 obligations under the *Labour Relations Code*. Section 12 deals with a union's duty of fair representation and it provides:

12(1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith

¹¹⁶ Section 8 of the Code provides: "8(1) A person must not, without a *bona fide* and reasonable justification, (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical disability, sex or sexual orientation of that person or class of persons. (2) A person does not contravene this section by discriminating (a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or (b) on the basis of physical or mental disability, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance".

- (a) in representing any of the employers in an appropriate bargaining unit, or
- (b) in the referral of persons to employment

whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

While, to date, there have been "surprisingly few cases determined by the Labour Relations Board concerning the definition of the word 'discriminatory' for s. 12 purposes, it has been suggested that it is "likely that section 12 duties will be complemented, if not effectively replaced, by the duties involved in an emerging area of jurisprudence: the application of human rights principles in the workplace".¹¹⁷ It is thus possible that the subject matter of a s. 14 Code complaint could mirror the subject matter of a s. 12 application before the Labour Relations Board.¹¹⁸ At minimum, the human rights principles governing a union's accommodation duties towards its bargaining unit employees will increasingly inform the content of its s. 12 *Labour Relations Code* duties.

The HRT has concluded that a union's duties under human rights legislation and s. 12 of the *Labour Relations Code* are different.¹¹⁹ Accordingly, the HRT has rejected arguments that the complaint before it should be dismissed in circumstances where the union's conduct has been the subject of an application before the Labour Relations Board based on allegations that the union breached its duty of fair representation to the complainant.

¹¹⁷ Donald W. Bobert, *Union's Duty of Fair Representation* (CLE Human Rights – 2000 Update). The author also notes that: "The Labour Board has, however, considered the word 'discriminatory' under s. 12 in the human rights context in the following cases: *Carol Illic* (1995), B.C.L.R.B. No. B235/95; *Re Stuart* (1996), B.C.L.R.B. No. B336/96; *Re Krimmer* (1998), B.C.L.R.B. No. B149/98; *Re Sutherland* (1999), B.C.L.R.B. No. B63/99; and *Re Vandale* (2000), B.C.L.R.B. No. B97/2000. In the *Illic* and *Sutherland* cases, the Board dismissed the s. 12 complaint pending an appropriate determination of the matter by the Human Rights Council (or Tribunal). The Board left it open to the complainant to refile the application if the Human Rights Council (Tribunal) did not address all relevant issues. The decision in *Re Stuart* is interesting because it appears to foreclose a s. 12 complaint in a duty to accommodate type situation ... This decision was rendered prior to the development of the arbitral jurisprudence noted above with respect to a union's duty to accommodate short of undue hardship. One wonders whether the Labour Relations Board could today dismiss a similar complaint without consideration of that issue".

¹¹⁸ See, for example, *Bracic (Re)*, [1999] B.C.L.R.B.D. No. 414 (Q.L.) where the LRB considered a complaint under s. 12 of the *Labour Relations Code* that alleged the Union breached its duty of fair representation when it failed to negotiate "equal pay for equal work" wage rates in the first collective agreement.

¹¹⁹ *Seinoret v. B.C. Rehabilitation Society*, [1998] B.C.H.R.T.D. No. 10.

Constitutional Issues

Another area where concurrent jurisdiction arises relates to issues concerning the constitutional validity or application of Code provisions or process compliance with constitutional principles. These types of issues can be adjudicated before the HRT or before the courts.

The test for constitutional competence in an administrative tribunal to make *Charter* determinations involves a question of statutory interpretation. Did the legislature intend to confer authority on the tribunal expressly or implicitly to consider general questions of law? If an administrative tribunal has the power, expressly or impliedly, to consider general questions of law, it follows by operation of s. 52(1) of the *Constitution Act, 1982*, that the tribunal must be able to address constitutional issues, including the constitutionality of its own legislation.¹²⁰

The test for constitutional competence was applied in a human rights context in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854. There the Court held that the Canadian Human Rights Commission does not have the jurisdiction to consider the constitutionality of its enabling legislation because it is only empowered to investigate and refer complaints to hearing. The Court made it clear, however, that the Canadian Human Rights Tribunal, which possesses a more general power to deal with questions of law and conduct quasi-judicial hearings, would have the jurisdiction to consider a broad range of constitutional questions with one exception.¹²¹ The exception was that the tribunal could not consider the constitutionality of a jurisdiction-conferring provision in its home statute.

Since the Code does not confer express statutory authority to consider questions of law, the question is whether the HRT has the implicit power to consider these matters taking into account

¹²⁰ *Cooper v. Canada (Human Rights Commission)*, 1996] 3 S.C.R. 854, per La Forest J. at pp. 890-895.

¹²¹ The Majority of the Court held (at ¶¶896-7) that: "As with the Commission, there is no explicit power given to a tribunal to consider questions of law. Taken together, ss. 59(1) and 53(2) of the Act state that a tribunal shall inquire into the complaint referred to it by the Commission to determine if it is substantiated. This is primarily and essentially a fact-finding inquiry with the aim of establishing whether or not a discriminatory practice occurred. In the course of such an inquiry a tribunal may indeed consider questions of law. As with the Commission, these questions will often center around the interpretation of the enabling legislation. However, unlike the Commission, it is implicit in the scheme of the Act that a tribunal possess a more general power to deal with questions of law. Thus tribunals have been recognized as having jurisdiction to interpret statutes other than the Act (see *Canada (Attorney General) v. Dunken*, [1989] 2 F.C. 24 (C.A.)) and as having jurisdiction to consider constitutional questions other than those noted above. In particular, it is well accepted that a tribunal has the power to address questions on the constitutional division of powers (*Public Service Alliance of Canada v. Qu'Appelle Indian Residential Council* (1986), 7 C.H.R.R. D/3600 (C.H.R.T.)), on the validity of a ground of discrimination under the Act (*Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450 (C.H.R.T.)), and it is foreseeable that a tribunal could entertain Charter arguments on the constitutionality of available remedies in a particular case (see *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.)"

a broad range of factors including efficiency, accessibility and expertise. There is no doubt that it has this implicit power. It is now settled law in this jurisdiction that the HRT is competent to decide constitutional questions,¹²² including constitutional questions involving the validity of the provisions of its constituent legislation.¹²³

Since the enactment of the Code, the HRT has faced constitutional challenges to the validity of its constituent legislation in two cases. Both involved complaints under s. 7(1)(b) of the Code (prohibition of publication of material that is likely to expose a person or group of persons to hatred or contempt).

The first case involved two complaints filed by the Canadian Jewish Congress against Doug Collins and North Shore Free Press Ltd. (dba North Shore News) concerning an opinion column entitled "Hollywood Propaganda" published in the North Vancouver community newspaper in 1994 (the CJC case). The respondents issued a notice of constitutional challenge alleging among other things that s. 7(1)(b) of the Code was *ultra vires* the province because it trenched upon federal criminal law jurisdiction under s. 91(27) of the *Constitution Act, 1867* and violated s. 2(b) of the Charter in a manner which could not be demonstrably justified under s. 1. The Press Council, which was granted intervener status, also advanced an argument challenging the independence of the HRT under the minimal impairment branch of the s. 1 test.

The CJC case occupied nineteen days of hearing time, most of which related to the constitutional challenge. The parties disagreed on the order for hearing the merits of the complaints and the constitutional issues. The HRT decided to address the constitutional issues before addressing the merits of the complaint. The HRT dismissed the constitutional challenge on the basis that s. 7(1)(b) is *intra vires* the province and constitutes a reasonable and demonstrably justified limit on free expression. The HRT also dismissed the complaints on their merits because the publication

¹²² Such questions may arise in the context of determining the HRT's jurisdiction over a complaint. For example, the HRT may rely on the scope of constitutional division of powers between federal and provincial governments under ss. 91 and 92 of the *Constitution Act, 1867*, as a basis for determining the scope of a Code provision or to determine whether the subject matter of a complaint is within the HRT's jurisdiction. Additionally, constitutional principles may be engaged where the HRT resorts to principles of compliance with constitutional law to interpret its constituent legislation. Section 7 Charter issues of the type engaged in *Blencoe* may be raised as threshold questions where there are allegations of undue delay. Also, Code provisions may be challenged as unjustifiably infringing on Charter rights (e.g., freedom of expression) or as being invalid based, for example, on section 96 grounds.

¹²³ *Collins v. Abrams*, 2001 BCCA 22, leave to appeal denied, [2001] S.C.C.A. 109 (Q.L.). In that case, the HRT determined that the respondent had violated s. 7 of the Code. The second stage of the hearing was to determine whether s. 7 violated s. 2 of the Charter. The respondent sought to prohibit the HRT from proceeding with a hearing on the ground it was not competent to hear and decide Charter questions. The Court of Appeal affirmed the Supreme Court's decision that the HRT had jurisdiction to entertain the constitutional questions raised by the respondent.

in question did not meet the standard for hate speech. The decision was not challenged on judicial review.

The second case involved two complaints filed by Harry Abrams against the same respondents concerning a series of four opinion columns authored by the same journalist (*Collins v. Abrams*). The respondents again issued a notice of constitutional challenge to s. 7(1)(b) of the Code but then applied for an order allowing the constitutional issues to be severed from and heard after the merits of the complaints. The HRT allowed the application and the hearing on the merits of the complaints proceeded. The HRT upheld the complaints and reserved the right to hear the constitutional challenge to the legislation.

Before the hearing reconvened to deal with the constitutional issues, one of the respondents filed a judicial review application challenging the HRT's jurisdiction to consider the constitutional challenge. The Supreme Court held that the HRT had jurisdiction to consider the *Charter* questions and remitted the matter back to the HRT to deal with those issues. The decision was affirmed on appeal, and leave to appeal to the Supreme Court of Canada was dismissed: *Collins v. Abrams*, 2001 BCCA 22, leave to appeal denied, [2001] S.C.C.A. 109 (Q.L.). Submissions have now been filed with the HRT on the constitutional issues and the decision is currently on reserve.

While the Court of Appeal's decision in *Collins v. Abrams* removes any question that the HRT has jurisdiction to determine constitutional questions, there is room to debate whether the complaint process is the most appropriate forum for dealing with constitutional challenges to the Code. There are an increasing number of complaints that raise broad systemic discrimination issues relating to the provision of educational, health and human resources services by governmental bodies. The subject matter of these complaints can also form the subject matter of equality actions in the courts based on s. 15 of the *Charter*. Questions have arisen about the appropriateness of deciding constitutional and other broad public policy questions in a human rights tribunal forum.

There are a number of competing factors that must be taken into account in assessing the appropriateness of having these types of issues adjudicated by an administrative tribunal instead of a court. To the extent that purely constitutional questions are involved, these factors will be fully explored in the background paper to the Administrative Justice Project that addresses administrative tribunals generally. Accordingly, the following discussion is only intended to briefly highlight factors of particular relevance to the human rights context.

One factor of fundamental importance is the issue of accessibility. Few would dispute that a legislative scheme designed to protect the rights of the most vulnerable members of our society should be as accessible as possible. The hearing process before the HRT provides parties to a complaint with an accessible forum for dealing with constitutional issues that arise in respect of a complaint. The removal of the HRT's jurisdiction over either constitutional issues or systemic issues that could be advanced under *Charter* equality principles would impede accessibility to complainants and respondents.

This was recently illustrated in *Berscheid v. Westbank First Nation*, which involved a complaint by Westbank First Nation alleging that the respondent contravened s. 2(1)(b) of the *Human Rights Act* (the predecessor to s. 7(1)(b) of the Code) by erecting signs along the highway adjacent to his property. The respondent filed a judicial review application seeking to challenge the decision of the former Human Rights Council to hear the complaint as well as declaratory relief. The Court adjourned the judicial review application and remitted the constitutional issue to the HRT for consideration. On appeal, the respondent abandoned his challenge to the jurisdiction of the HRT to hear the complaint, opting instead to bring a facial challenge to s. 2(1)(b) of the *Human Rights Act*. The judicial review was converted to a civil action for declaratory relief by order of the Court. It then proceeded as an action for declaratory relief before the Supreme Court. Faced with the daunting prospect of weeks of hearing on the constitutionality of s. 2(1)(b), the Westbank First Nation, which was not funded by legal aid for the challenge, opted to withdraw its complaint thus rendering the issue moot. This case serves to illustrate that complainants may not pursue complaints when faced with the prospect of litigation to determine constitutional questions.

A second factor relates to the different rules for admissibility of evidence that govern administrative tribunal hearings. Unlike a court, the HRT is not bound by the strict rules of evidence. In *Cooper*, La Forest J. expressed concern that a tribunal's ability to use non-court type evidence militated against conferring *Charter* jurisdiction. Although the strict rules of evidence do not apply to hearings before the HRT, it is not apparent from the CJC case that the relaxed standard for admissibility made any difference to the outcome of the constitutional challenge. The HRT there followed the same approach as the courts with respect to the admissibility of s. 1 evidence to establish legislative facts. It is possible that a more relaxed standard for admissibility could be a factor in relation to the evidence adduced on the merits of a complaint (which constitute the adjudicative facts on which the constitutional challenge is based), but again this was not evident in the CJC case.

A third factor relates to the issue of judicial efficiency. Some argue that removing constitutional jurisdiction from administrative tribunals prevents duplication and enhances judicial efficiency.

Others argue that depriving the HRT of constitutional jurisdiction would only foster delay and the fragmentation of proceedings. The two sides of the efficiency debate were evident in *Cooper* where La Forest J., for the majority, observed that any superficial attraction to having the constitutional matter heard by the commission would be outweighed by the likelihood of judicial review proceedings. He concluded that it would be more efficient for a complainant to seek a declaration of constitutional invalidity at the outset. In dissent, McLachlin J. felt that forcing complainants to launch a *pro forma* complaint with the commission knowing that the issue would have to be litigated in Federal Court would only serve to discourage constitutional challenges to the Act.

The fact that there have only been two constitutional challenges to the Code in the last four years suggests that constitutional jurisdiction does not represent a significant burden on the HRT. It may be, however, that the hearing time involved consumes a disproportionately significant amount of the HRT's resources compared to other complaints. Additionally, the procedural history of the *Collins v. Abrams* case suggests that it may be more efficient to have the courts deal exclusively with constitutional challenges to provisions of the Code. On the other hand, the Court of Appeal's decision in *Collins v. Abrams* has clarified the law as to when a court should intervene with an ongoing constitutional matter before the HRT. It is also more time-consuming for a court to hear the evidence for a constitutional challenge than to conduct a judicial review on the record established before the HRT.

A fourth factor relates to the question of relative expertise. The decision in the CJC case was written by a former constitutional law professor who was eminently qualified to deal with the numerous division of powers and *Charter* arguments advanced at the hearing. However, there is currently no statutory requirement that HRT members have specialized legal training.¹²⁴ It would be very difficult for HRT members without specialized legal expertise to deal with complex constitutional questions. As pointed out elsewhere in this background paper, courts do not consider human rights tribunals, regardless of their composition, to have special expertise in determining questions of law generally and no deference will be afforded to their decisions on constitutional and jurisdictional questions. The Supreme Court of Canada continues to grapple with the question of whether it is beneficial to have constitutional issues addressed by a tribunal at first instance.

Another factor relates to the adequacy or form of the remedy. While the HRT has jurisdiction to determine the validity of its constituent legislation, it does not have jurisdiction to grant declaratory

¹²⁴ While it has not always been the case, all of the current HRT members have legal training.

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relief under s. 52 of the *Constitution Act, 1982*. Only section 96 courts have the ability to grant a declaration that a statutory provision is unconstitutional. A judicial declaration is binding until such time as it is set aside on appeal. However, when a tribunal like the HRT concludes that a provision of the Code is unconstitutional, it can only refuse to apply the provision to the specific facts before it. Indeed, in the *Collins v. Abrams* case the HRT was invited by some of the parties to either adopt the earlier CJC decision on the constitutionality of s. 7(1)(b) or, alternatively, to adopt the evidentiary record from that case. The HRT declined to do so. Since the HRT is not bound by its earlier decisions, it was necessary for counsel for the Attorney General to reintroduce the same s. 1 evidence in the *Abrams* case that was adduced in the earlier CJC case.

Where the complaint raises broad systemic issues relating, for example, to the provision of services, then the range of remedies before the HRT are quite different than would be the case if such a case were launched as a s. 15 equality challenge under the *Charter*. The test for the statutory defence of *bona fide* and reasonable justification under s. 8 of the Code also differs significantly from the s. 1 justification defence under the *Charter*.

Some Views on the Problem of Parallel or Multiple Proceedings

Not surprisingly, a number of reviews and reports have considered the problems associated with parallel or multiple proceedings in a human rights context. Most recently, the La Forest Panel, after reviewing some of the proposals for reform in this area, concluded that the human rights tribunal should have primary and oversight jurisdiction over all human rights issues. Consistent with this conclusion, the La Forest Panel recommended a system quite similar to that in effect in this jurisdiction; namely, where an individual has more than one forum for pursuing a claim of discrimination, the human rights process should be deferred pending the exhaustion of the other available process or processes. A summary of the views expressed on the subject of parallel or multiple proceedings in the 1994 Black Report, the 1995 Ontario LRC Report and the La Forest Report is attached as Appendix D to this Background Paper.

Code Mechanisms for Addressing Duplication Issues

CIM Powers

The *Human Rights Code* (s. 27(1)(f))¹²⁵ confers discretion on the CIM to dismiss a complaint (or part of a complaint) where its substance has been "appropriately dealt with in another

¹²⁵

The grounds on which the CIM is able to dismiss a complaint (or part of it) without referral to a hearing are more extensive than those provided for in the former *Human Rights Act*, S.B.C. 1984, c. 22. Under that Act, the former Human Rights Council was empowered to refuse to proceed with

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proceeding".¹²⁶ This discretion is thus limited to those circumstances where the subject matter of the complaint has already been dealt with in another proceeding. This discretion must be considered in connection with s. 25 of the Code:

Deferral of a complaint

25(1) In this section and in section 27, "proceeding" includes a proceeding authorized by another Act and a grievance under a collective agreement.

(2) If the commissioner of investigation and mediation determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the commissioner may, at any time before the complaint is referred to the tribunal for a hearing, defer further consideration of the complaint until the outcome of the other proceeding.

(3) In making a determination under subsection (2), the commission of investigation and mediation must consider all relevant factors including

- (a) the subject matter and nature of the other proceeding, and
- (b) the adequacy of the remedies available in the other proceeding in the circumstances.

The CIM has developed policies and procedures for the interpretation and application of s. 27(1)(f) of the Code to a complaint.¹²⁷ Those policies and procedures provide in part:

... This section may be used to dismiss a complaint which had been formally deferred pursuant to subsection 25(2) or one which has been the subject of another proceeding which has been completed by the passage of time.

the investigation of a complaint if one of four circumstances were established. More particularly, section 13(1) of the Act provided that the council could decide not to proceed where "it appears to the council that the complaint (1) is not within the jurisdiction of the council, (2) could be more appropriately dealt with under another Act, (3) is trivial, frivolous, vexatious or made in bad faith, or (d) is based on facts that occurred more than 6 months before the complaint was filed, unless the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay". The *Human Rights Act* also provided that, on completion of an investigation, the former Council could discontinue the proceeding without a hearing. No statutory guidance was provided as to how the Council's discretion to discontinue was to be exercised. As a result, the courts in the context of judicial review proceedings determined the rules that would govern the exercise of the Council's discretion. In general terms, the Council was able to evaluate the whole of the information before it as gathered in the investigative stage and make an assessment based on its collective expertise as to whether a hearing was or was not warranted. This test enabled the Council to weigh evidence and even consider questions of credibility in a very limited sense: see *Rogers v. B.C. Council of Human Rights and U.B.C.* (1994), 21 C.H.R.R. D/67 (B.C.S.C.) and cases there cited; *Kratoska v. B.C. Council of Human Rights CITE* (B.C.C.A.). See also, generally, Deborah K. Lovett, *Pre-hearing Determinations under B.C. Human Rights Legislation – Putting Your Best Foot Forward* (1997) 55 Advocate 217. The language used in s. 27(1)(c) of the Code ("there is no reasonable basis to justify referring the complaint or that part of the complaint to the tribunal for a hearing") reflects the kind of test established by Mr. Justice Shaw in the *Rogers* case, *supra*.

¹²⁶ Human Rights Code, s. 27(1)(f).

¹²⁷ The CIM's policy on the interpretation of s. 27 was adopted June 28, 1999.

Section 27(1)(f) refers to matters which have been dealt with, not those which could be. Thus, this section can only be used when the other proceedings is finished. (The Code has provisions allowing for the deferral of complaints pending the outcome of other proceedings. In the absence of a decision to defer, the Commission will not delay dealing with a complaint pending other proceedings.)

This section applies whether the complainant was successful in the other proceeding or not. The question is not whether the complainant was successful in the other proceeding, but whether the other proceeding has appropriately dealt with the substance of the complaint.

The CIM's policies and procedures address in some detail the constituent elements of s. 27(1)(f), including the meaning of "substance of the complaint", "subject matter of the other proceeding" and "adequacy of remedies" of the other proceeding.¹²⁸ Of the CIM's ability to defer and dismiss under ss. 25 and 27(1)(f) of the Code, the point was made¹²⁹ that:

¹²⁸

The CIM's policy and procedures on s. 27 provides as follows: The substance of the complaint: The "substance" of a complaint, for the purposes of this section refers to the significant elements of the matter in dispute. The substance of a complaint refers to the harm that was done or the benefit which was denied and the ground of discrimination. This is because the purpose of the Code is to eliminate proscribed discrimination. The other proceeding must deal with the ground of discrimination in order to properly consider the substance of the complaint which could be filed under the Code. For example, when dealing with a complaint that a person was not hired because of race, the substance of the complaint is "not hired because of race." The substance will not have been dealt with if the hiring dispute is dealt with but the issue of race is not. The subject matter of the other proceeding: The substance of the human rights complaint must coincide with the subject matter of the other proceeding. Thus, if a grievance deals with dismissal as a disciplinary measure (without a mention of race discrimination) and a human rights complaint deals with an alleged discharge because of race the two issues do not coincide and the other proceeding cannot be seen as appropriate to deal with the human rights complaint. However, in such a circumstance the complainant would have to explain why the issue of race was not raised in the grievance. The failure to do so may reflect negatively on the *bona fides* of the complainant unless there is a good explanation for the failure to mention race in the grievance. The nature of the other proceeding: Another proceeding includes "a proceeding authorized by another Act and a grievance under a collective agreement". This would include redress mechanisms established by other laws, actions taken in the judicial system, and privately contracted dispute resolution systems such as grievances, commercial arbitration, or the application of formal redress mechanisms such as a respondent's harassment policy. The limitation in this section is that the other proceedings must be a formally established system of dispute resolution which is generally known by those to whom it applies. In considering the nature of the other proceeding, the following are relevant factors: (1) the administrative fairness of the other proceeding; (2) the expertise of the decision-makers and investigators; (3) whether the case involves important human rights issues which invoke the public interest enunciated by the Code; (4) which forum is more appropriate for discussion of the issues; (5) whether the other proceeding protects the complainant against the discriminatory practice; and (6) whether there is a conflict between the goals and intent of the Code and the other proceedings, and practical issues including the time which each procedure would take and the consequences in terms of emotional strain, personal relations and long term outcome of processes. The adequacy of the remedies available in the other proceeding in the circumstances: The adequacy of the remedies available in the other proceeding are to be assessed against the substance of the human rights complaint not the actual complaint filed in the other proceeding. This requires looking at the substance of the complaint and determining whether the other proceeding is capable of providing an adequate remedy for the harm which was alleged. The question is not whether the complainant was successful in the other proceeding, such whether the proceedings would have been capable of providing an adequate remedy had the complainant been successful. The test is not the duplicity of

... On the one hand, the inclusion of these provisions in the new Code codify to some degree the concept of issue estoppel and reflect a recognition of the undesirability of multiple proceedings on the same issue, from the perspective of costs to the employer, the prevention of "double jeopardy" for the employer, the expenditure of the scarce resources of the tribunal and certainty and finality for the parties on these issues.

On the other hand, though, both [provisions] require that the commissioner of investigation and mediation consider the issue of remedies which are available in each forum in deciding whether or not to defer the complaint or dismiss it entirely. This appears to be a consideration over and above those associated with the concept of issue estoppel at common law and addressed by the Council in Deborah Marc and Axton. If, as the wording of the Code suggests, the availability of additional remedies is a factor that must be considered by the commissioner of investigation and mediation on every application for a deferral or dismissal of a complaint, there will be few, if any, such deferrals or dismissals where the other proceeding is a grievance arbitration since, at present, grievance arbitrators lack the authority to award damages for pain and suffering.

If the CIM determines that the other proceedings, once exhausted, did not "appropriately" deal with the complaint, the complaint is then referred to the HRT.¹³⁰

HRT Powers

The HRT does not have a statutory power or discretion to dismiss a complaint without a hearing.¹³¹ Accordingly, the HRT's ability to address duplication issues is circumscribed by

the potential remedies but their adequacy to compensate the person for the alleged harm done. All relevant factors: This catch all phrase is used to capture other relevant factors not previously considered. An example of a relevant factor might be a case whether a procedure would usually have been considered capable of appropriately dealing with the complaint, but the complainant can explain why for some reason it was not appropriate in this case.

¹²⁹ Andrea Zwack, *supra*. *Some Issues in the Interaction of Human Rights & Labour Law Processes*. (CLE, Human Rights '97).

¹³⁰ Over the past 4 1/2 years, the CIM deferred eighty-eight cases. Of these, fifty-five were dismissed, five were settled, twenty-seven remain deferred and one was referred to hearing.

¹³¹ The Black Report recommended (at pp. 149-50) that that Tribunal have statutory powers enabling it to deal with issues of actual or potential duplication of adjudication of human rights issues. The specific recommendations were: "3-C-76 It is recommended that the *Human Rights Code* require the Human Rights Tribunal to consider whether the substance of a human rights claim has been fully and adequately dealt with in another proceeding, if any party to the proceedings requests such a determination. 3-C-77 It is recommended that in making this determination, the number of the Tribunal assigned to the claim at the time of the application should take account of all relevant factors, including: the subject matter of the other proceedings, and whether those proceedings had fully and adequately considered the human rights aspects of the dispute; the expertise of the tribunal or decision-maker in human rights; the fairness and effectiveness of the other process and whether or not the parties had been adequately represented in the process; and whether the other proceeding offered a range of remedies comparable to those available under the *Human Rights Code* in the circumstances. 3-C-78 It is recommended that the statute authorize the Tribunal to dismiss a human rights claim that has been fully and adequately considered in another proceeding or to limit the claim to matters not fully and adequately dealt with. The Tribunal would not reassess the ultimate result in the other proceeding if the proceeding had met the criteria just outlined. 3-C-

common law principles. There have been cases where the HRT (and the former Human Rights Council) have applied the legal doctrines of *res judicata*, cause of action estoppel and issue estoppel as a basis for declining to proceed with a full adjudication of a complaint where satisfied that the same or similar issue has already been litigated in another forum (i.e., grievance arbitration).¹³² However, there are difficulties with a strict application of these legal rules in the context of a statutory tribunal operating under legislation with unique objects, goals and remedies.¹³³ This point was made by the Ontario LRC:¹³⁴

While res judicata is sufficient to prevent multiple applications in most cases within a particular administrative regime, it has not been capable of preventing multiple applications among the various tribunals. There are two reasons for this – lack of unity of parties and lack of uniformity in the questions raised for resolution.

The lack of unity of parties occurs primarily under the human rights regime and the labour relations regime. In the former, irrespective of who the complainant is, the complainant is represented in hearings before the Board by the Human Rights Commission; in the latter, the employee is represented by the union. Accordingly, even if an issue already decided by a human rights board of inquiry,

79 It is recommended that if the Tribunal decides that a portion of the claim has been fully and adequately dealt with in another proceeding, it should limit the hearing under the *Human Rights Code* to those matters not fully and adequately dealt with. 3-C-80 It is recommended that the *Human Rights Code* permit any party to a claim to apply to the Tribunal to defer the hearing pending the outcome of another proceeding concerning the same, or essentially the same, matter. 3-C-81 It is recommended that the Tribunal should be authorized to defer the hearing if the other proceeding appears capable of fully and adequately dealing with the substance of the claim, taking account of the same criteria specified in Recommendation 3-C-77. 3-C-82 It is recommended that the Tribunal may defer the hearing for no more than ninety working days, unless a different limit is specified in regulations enacted under the *Human Rights Code*. 3-C-83 It is recommended that the Commissioner for Human Rights and the parties to a claim should have the opportunity to make representations before a final decision is made to dismiss a claim and that the claimant be consulted before a decision to defer a hearing.

¹³² See for example: *Cote v Canadian Forest Products Ltd.*, [2001] B.C.H.R.T.D. No. 13 (Q.L.), *Axton v. B.C. Transit*, [1996] B.C.C.H.R.D. No. 25 (Q.L.).

¹³³ This is well-illustrated in such cases as *Tozer v. Ministry of Transportation & Highways (c.o.b. Motor Vehicle Branch, Region III, Regional Office)*, [1998] B.C.H.R.T.D. No. 14 (Q.L.), upheld on judicial review, [1998] B.C.J. No. 2594 (S.C.) (Q.L.), *Gold v. British Columbia (Ministry of Finance and Corporate Relations, Public Service Employee Relations Commission)*, [1998] B.C.H.R.T.D. No. 6 (Q.L.), *Seignoret v. British Columbia Rehabilitation Society (c.o.b. as G.F. Strong Centre)*, [1998] B.C.H.R.T.D. No. 10 (Q.L.), and *Marc v. Fletcher Challenge Canada Ltd.*, [1996] B.C.C.H.R.D. No. 24 (Q.L.) where the doctrines of *res judicata*, cause of action estoppel and issue estoppel were found not to apply. The La Forest Panel simply observed of the doctrines (in Chapter 13 of its Report) that "these rules already exist and have not reduced the concerns that we heard on this issue. These rules have often not been applied by tribunals and courts because they have found that the human rights legislation has different goals, purposes and remedies from other decision-makers such as labour arbitrators". Similarly, the Ontario LRC observed in its 1995 Report (at p. 89) that "[w]hile *res judicata* is sufficient to prevent multiple applications in most cases within a particular administrative regime, it has not been capable of preventing multiple applications among the various tribunals. There are two reasons for this – lack of unity of parties and lack of uniformity in the questions raised for resolution".

¹³⁴ Ontario LRC Report, page 67.

an arbitrator, or the Labour Relations Board were brought before a subsequent tribunal, including one of these tribunals, the parties in each case would be different. This was amply illustrated by the Ontario Board of Inquiry decision in Hyman v. Southam Murray Printing Ltd.

In this decision an argument was made to the board of inquiry that it had no jurisdiction to consider the complaints of discrimination under the Ontario Human Rights Code as a board of arbitration had already considered the matter in the context of determining whether the complainant's dismissal from employment constituted discrimination under the collective agreement. In deciding to reject the claim that the issue was already res judicata, the board of inquiry made the following comment:

It is my view that the effect of permitting previous grievance arbitration awards to engage the principles of res judicata would undermine the objectives of the Ontario Human Rights Code and, at the same time, would provide an undesirable disincentive to the use of grievance arbitration as a means for resolving employment related disputes which involve, perhaps, amongst other factors, allegations of discriminatory treatment. A comparison of these two institutional devices for dispute resolution indicate that there are a number of advantageous features to the remedial scheme set out in the Ontario Human Rights Code which have no parallel in the grievance arbitration process. A complaint lodged under the Ontario Human Rights Code is taken to a public body, the Ontario Human Rights Commission, whose exclusive mandate is to investigate such complaints and seek their resolution. Prosecution of the complaint by the Commission is uncomplicated by any ongoing relationship between the Commission and the respondent in a given case. In the grievance arbitration context, however, the parties to the arbitration are, of course, the employer and the union. It is established labour relations law that the union has control over the carriage of the grievance and thus, for example, is permitted to settle or withdraw the grievance at any time without the consent of the individual grievor.

As a result of this difference, the board of inquiry was able to conclude that there is a "legislative intention which is inconsistent with the idea that boards of inquiry would be precluded from conducting an investigation, once appointed, by the result of a previous grievance arbitration". Other boards of inquiry have come to the same conclusion.

The second method by which claims of res judicata are commonly rejected by all of the administrative regimes considered by this report is where the questions involved in the subsequent adjudication are different from those in the first. To understand the implications of this rationale for administrative tribunals, it is important to realize that, to create a different question, it is sufficient for another tribunal with a different jurisdiction to consider the issue. Since a different tribunal necessarily implies a different question, even though it may be the same question as viewed from a different perspective, the principle of res judicata can

*never be applied to prevent one tribunal from reconsidering a matter already tried before another tribunal.*¹³⁵

The approach illustrated by the cases referred to in the Ontario LRC Report demonstrates that many human rights tribunals have tended to apply *res judicata* principles strictly and mechanically. Some tribunals have emphasized the quasi-constitutional nature of human rights as a basis for finding it is inappropriate to apply these principles in a human rights context. Many point to the lack of identity of parties or the lack of identity of remedies as a basis for declining to apply estoppel doctrines. In general, the cases reflect considerable reluctance on the part of human rights tribunals to apply finality doctrines to human rights proceedings; however, this reluctance may fade in light of the recent judicial clarification by the Supreme Court of Canada of the application of the *res judicata* doctrine to administrative tribunals and the flexible way in which it should be applied.

Other Canadian Jurisdictions

Legislative measures to avoid potential duplication in the adjudication of human rights issues are in place in some other jurisdictions.¹³⁶ A summary of those legislative measures is attached as Appendix E to this background paper.

CHAPTER VII: FORUM MULTIPLICITY OPTIONS – SPECIAL CONSIDERATIONS

Before moving on to the issue of delay, we will outline options to deal with issues of concurrent jurisdiction and resulting overlap or duplication in the consideration or adjudication of what are essentially human rights issues. These options will inform the Workplace Tribunal Review's

¹³⁵ By way of example, the LRC refers to the Ontario case of *Fleming v. Byron Jackson Division, Borg-Warner (Canada) Ltd.* (1982), 3 C.H.R.R. D/765. There the board of inquiry concluded that the principle of *res judicata* did not apply to a complaint of race-based employment discrimination. The subject matter of the complaint had been the subject of prior arbitration proceedings focused on whether there was just cause for the complainant's dismissal. The complainant, in the context of those proceedings, relied on anti-discrimination provisions in the collective agreement and argued he was dismissed because of his race and thus had been discriminated against. The reasons given by the Ontario board for refusing to apply estoppel principles were: (1) the parties in the human rights proceeding were different; and (2) the questions involved in the two proceedings were different.

¹³⁶ There are comparable provisions in the *Alberta Human Rights, Citizenship and Multiculturalism Act* (see s. 20); the *Yukon Human Rights Act*, R.S.Y. 1986, c. 11 (see ss. 19-20); the *Manitoba Human Rights Code*, S.M. 1987-88, c. 45 (see s. 29); *New Brunswick Human Rights Code*, R.S.N.B. 1973, c. H-11 (see s. 18); *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c. 214 (see ss. 29 and 32A(1)) and the *Newfoundland Human Rights Code*, R.S.N. 1990, c. H-14 (see s. 21).

consideration of such issues from a human rights perspective. An understanding of these issues should also assist in assessing the structural options identified in Chapter XI.

Permitting the concurrent or consecutive pursuit of different remedies for alleged discriminatory conduct in multiple forums based on the same or similar facts presumes that providing a complainant with all available opportunities to pursue the range of remedies collectively available is a paramount or overriding policy objective. It also overlooks (or at least attaches minimal value to) the fact that another dispute resolution mechanism may provide very satisfactory (albeit not perfect) complaint resolution. The point has been made that a policy goal of providing the broadest range of remedies and a guarantee of human rights-like process and expertise is "inconsistent with maximizing [the] ability of respondents to avoid duplicative proceedings".¹³⁷ It may also be a goal that is of less significance where on-going relationships are at stake than a goal of expeditious and non-adversarial resolution of discrimination complaints.

There are many sound policy reasons that favour finality and efficiency. The most obvious relate to the personal and institutional costs associated with relitigating the same or similar issues. In addition, there is the administrative justice goal of achieving consistency in tribunal decision-making (i.e., removing the opportunity for inconsistent findings between administrative tribunals), a goal that serves to enhance the credibility and rationality of our overall system of administrative justice as well as the integrity and credibility of the individual tribunals.

A policy choice that favours finality by depriving individuals of the ability to resolve or litigate human rights issues in more than one forum need not necessarily sacrifice fairness principles. Similarly, a policy choice that favours speed and efficiency need not necessarily compromise the quality of substantive justice that is ultimately provided by the chosen forum. Nor does it necessarily follow that a statutory preclusion of litigation of human rights issues in more than one forum results in the victim being deprived of a broad range of remedies that would otherwise be available, although, as we point out above, the provision of appropriate rather than all-inclusive

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These latter two points were made by Professor Philip Bryden in his article, *Principles for Allocating Jurisdiction over Human Rights Claims between Labour Arbitrators and Human Rights Agencies* (CLE Human Rights: Disability Issues, November 1999). The author notes that these types of policy goals are in competition with one another: "Preserving the greatest extent of complainant choice is inconsistent with maximizing that ability of respondents to avoid duplicative proceedings. An approach to the allocation of jurisdiction that enhances the satisfaction of one party may detract from the satisfaction of another. Limiting public sector financial costs may result in the imposition of increased costs, directly or indirectly, on the parties to proceedings. Promoting speedy and final resolution of disputes may have negative implications for the substantive quality of the outcomes of dispute resolution processes. Moreover, it is not obvious that either the *Human Rights Code* itself or the demands of justice would permit a result in which one set of goals is pursued to the complete exclusion of the others".

or comprehending remedies may be best in a workplace setting where ongoing relationships are in issue.

There are different ways in which the problem of overlap can be addressed, depending on how one chooses to balance the underlying policy objectives identified above. Since the problem is most pronounced and complex in a unionized workplace, special consideration should be given to the overlap between grievance procedures and human rights complaints.

The Collective Agreement Context

As one author has aptly observed:¹³⁸

... Much of the law of judicial review of administrative decision-making is taken up with the development of the principles by which we strike a balance between achieving finality and achieving sound results. It would be a bold commentator indeed who would suggest that this body of law has reached a state of perfection. It is, however, noticeable that, as a general rule, we put more weight on finality in the resolution of ordinary labour relations disputes by arbitrators and more weight on sound results in the resolution of human rights disputes by human rights tribunals ... it is apparent that the potential for different approaches to the review of decisions depending on whether they are made by arbitrators or human rights tribunals can have an influence on the approach we take to the allocation of adjudicative jurisdiction between these bodies.

If it is accepted that, as a matter of policy, finality in adjudication is an important consideration¹³⁹ the most obvious models or options (and excluding the *status quo*) for dealing with subject matter overlap in a collective agreement context would be:

- granting exclusive jurisdiction to the HRT (i.e., labour arbitrators would have no jurisdiction);
- granting exclusive jurisdiction to labour arbitrators (i.e., HRT would not have jurisdiction);
- or,

¹³⁸ Professor Philip Bryden, *Principles for Allocating Jurisdiction Over Human Rights Claims between Labour Arbitrators and Human Rights Agencies* (CLE Human Rights: Disability Issues 1999).

¹³⁹ The *status quo* is a system where the consideration of the complaint is deferred pending the disposition of the other proceeding. This is the option that was selected by Black in his 1994 Report and is the option advocated as being most appropriate by the Canadian Bar Association in its submissions to the La Forest Panel. The CBA also identified the option of allowing "matters under the Act to proceed in other forums as long as the rights and remedies of the adjudicator in the other forum were the same as the Tribunal's. This may be of concern under a collective agreement, however, because the parties have not contemplated these substantive rights and remedies during negotiations. Further, to ensure protection of the public interest, there could be a requirement that when issues arise in proceedings as to the violation of the Act, notice would be given to the Commission, who would then have the authority to intervene. This may be a bit cumbersome, however".

- statutorily requiring an election of forum by the employee.

It should be noted that, in a labour context, attempts have been made to address the problem of duplication by negotiating collective agreement provisions that require a grievor to elect to pursue human rights issues either under the collective agreement grievance process or human rights complaint process. However, not surprisingly, these types of provisions have been found to be unenforceable based on primacy principles governing human rights legislation.¹⁴⁰ Accordingly, forced elections must be statutorily based in human rights legislation.

Additionally, many labour law practitioners have advocated, based on principles established by the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, that labour arbitrators should be afforded exclusive jurisdiction over human rights issues raised in the grievance process. To date neither human rights tribunals nor the courts have accepted that *Weber* principles operate so as to oust the jurisdiction of the human rights tribunal over human rights issues that can be the subject of a grievance. Instead, courts have generally recognized that the arbitrators and human rights tribunals share jurisdiction over such issues.¹⁴¹

There are some important points of distinction between the grievance procedures under a collective agreement and the human rights complaints process. A union employee's grievance rights are controlled by the union, not the employee. The union decides whether the grievance should proceed to arbitration and also provides the grievor with representation in any arbitration proceedings. The arbitrators are chosen by the parties to the particular collective agreement. These arbitrators may or may not have human rights law expertise. Their recognized area of specialized expertise is the interpretation of the collective agreement and in this regard, both the Labour Relations Board and reviewing courts accord them the highest level of deference. This

¹⁴⁰ Andrea L. Zwack, *Some Issues in the Interaction of Human Rights and Labour Law Processes*, (C.L.E., Human Rights '97): "... some collective agreements have purported to require that an employee make a choice between pursuing a grievance under the collective agreement and filing a human rights complaint. Such provisions are generally seen to be to the advantage of both the employer and the union, as the employer is protected from the "double jeopardy" associated with two proceedings on the same issue, and the union is protected from the possibility that subsequent to an unsatisfactory resolution of a grievance from the grievor's point of view, the union is joined with the employer as a respondent to the human rights complaint. For both parties to the collective agreement, the restriction of a complaint to only one process also prevents the doubt expenditure of resources and allows matters to be resolved quickly and with certainty ... However, in at least two decisions, arbitrators have held that collective agreement provisions which purported to require employees to give up a grievance concerning a complaint of discrimination ... were contrary to the *Human Rights Code* and therefore unenforceable for that purpose ...".

¹⁴¹ See for example, *British Columbia v. Tozer*, [1998] BCJ No. 2594 (B.C.S.C.), *Canada Post Corp. v. Barrette*, [1999] 2 F.C. 250 (Tr. Div.), *Saskatchewan Human Rights Commission v. Cadillac Fairview Corporation Ltd.* (1999), 173 D.L.R. (4th) 609 (Sask. C.A.).

deference is consistent with the underlying purpose of grievance arbitration; namely, the speedy, inexpensive and final adjudication of workplace disputes.

Grievance proceedings are generally held expeditiously, in accordance with the timelines established by the collective agreement. Labour arbitrators are afforded very broad adjudicative and remedial powers under the *Labour Relations Code* and are expressly granted jurisdiction to interpret external statutes. Review of arbitral awards is very limited. The *Labour Relations Code* provides for an appeal to the Labour Relations Board in only two circumstances: (1) if a party to the arbitration has been or is likely to be denied a fair hearing, or (2) if the award is one that is inconsistent with the principles expressed or implied in the Code or in another Act that deals with labour relations (the *Human Rights Code* is not, for this purpose, another Act that deals with labour relations). It is possible to challenge an arbitral award directly in the Supreme Court by way of judicial review. However, the legal doctrine of exhaustion of remedies is inevitably applied by the reviewing court (i.e., the court will require the petitioner to first exhaust available statutory appeal rights under the *Labour Relations Code*). Also, if it can be demonstrated that the basis of the arbitral award or decision is a matter of general law not encompassed by the Labour Relations Board's appeal jurisdiction, then there is a right of appeal directly to the Court of Appeal.

Accordingly, if an arbitral award turns on a question of the interpretation of a provision of human rights legislation – if the interpretation and application of human rights legislation is an "essential ingredient" of the arbitrator's decision – an appeal lies to the Court of Appeal. An example of this is the *Meiorin* case (discussed *supra* in Chapter V). However, it is not always easy to determine whether consideration of human rights principles by a labour arbitrator will engage the Court of Appeal's jurisdiction or is more properly the subject of an appeal to the Labour Relations Board.¹⁴² In *United Steelworkers of America, Local 7884 v. Fording Coal Ltd.*, [1999] B.C.J. No. 2109 (C.A.) (Q.L.) (*Fording Coal*), the Court of Appeal held that:

¹⁴² Not only is it difficult to determine whether the Court of Appeal's jurisdiction is engaged, human rights issues are often interlinked to other workplace issues. For example, in *Castlegar and District Hospital (Re)*, [2000] B.C.L.R.B.D. No. 484, three grounds of review were advanced before the Labour Relations Board in a s. 99 application to review an arbitration award. The award dealt with an employer decision to dismiss a nurse who suffers from a chronic addiction to narcotic and analgesic drugs. The nurse had been misappropriating drugs from the hospital. Two grounds for review were that the award was inconsistent with principles expressed or implied in the *Labour Relations Code*. One ground alleged that the award was inconsistent with *Human Rights Code* principles. Both parties agreed that the Board was the appropriate forum for review. The Board determined that the award was to be reviewed on a correctness standard to the extent the *Human Rights Code* was being interpreted. In response to the employer's arguments that the arbitrator committed an analytical error in his determination of undue hardship as part of the duty to accommodate analysis, the Labour Relations Board concluded at para. 51: The employer's remaining arguments assert an analytical error in the arbitrator's determination of undue hardship.

¶190 ... Most arbitral decisions or award are likely to be reviewable only by the Board. This is because the Human Rights Code, like the Charter, regulates and controls people's conduct in the workplace. In their conduct, unions and employers are under an obligation to adhere to the Constitution and human rights legislation. Many labour disputes will involve interpretation and application of such legislation, but few decisions or awards by arbitrators are likely to be based on such questions of general law. Once the interrelationship of the human rights principles and the dismissal and discipline provisions have been worked out, most arbitral decisions are likely to be heavily fact-laden. Their substance will be the facts: whether a disability has been proven, when the duty to accommodate has been fulfilled. In that regard the analysis of Mr. Justice Finch in *Martin-Brower*, *supra*, is instructive. One of the bases of an award or decision may be a question of general law, but the basis of an award will be the decision on the facts.

It is thus apparent that the Labour Relations Board retains an oversight function in relation to arbitral awards touching on human rights issues (e.g., duty to accommodate) that are heavily fact-laden. In other cases that focus more on pure questions of human rights law,¹⁴³ the Court of Appeal will take jurisdiction under the *Labour Relations Code*. The HRT has no role to play in overseeing such decisions. In contrast to arbitral awards that are focused on human rights questions of law and thus may be appealed directly to the Court of Appeal, HRT decisions are subject to judicial review proceedings in the Supreme Court. There are no time limitations for initiating judicial review proceedings.

The advantages and disadvantages of giving labour arbitrators exclusive jurisdiction over human rights issues arising in a grievance context have been canvassed in a number of legal articles.¹⁴⁴ Some of the advantages can be summarized this way:¹⁴⁵

It is debatable whether the arbitrator analyzed undue hardship in the manner suggested by the employer. However, we believe the relationship between culpability and undue hardship is a question of general law. The answer to that question should not turn on whether the employee is represented by a trade union. The Court of Appeal has jurisdiction to ensure that the principles of the *Human Rights Code* are uniformly applied to union and non-union workplaces: see *Fording Coal Ltd.*, *supra*.

¹⁴³ In *Fording Coal*, the Court determined that two of the three arbitral awards before it properly came within its appeal jurisdiction: "¶157 As the original panel of the Labour Relations Board noted, had the main ingredient or substance of the arbitrator's decision been one of fact, whether the employer had accommodated his disability to the point of undue hardship, no appeal could have been brought to the Board. Nor could one have been brought to this Court. However, the main ingredient or substance of the decision was not one of fact. Rather, it was the arbitrator's opinion as to the nature and scope of the duty to accommodate, regardless of factual circumstances. Fundamental to his decision was his view the duty to accommodate did not encompass irregular attendance".

¹⁴⁴ See for example, Andrea L. Zwack, *Some Issues in the Interaction of Human Rights and Labour Law Processes* (CLE Human Rights '97); Professor Philip Bryden, *Principles for Allocating Jurisdiction Over Human Rights Claims between Labour Arbitrators and Human Rights Agencies* (CLE Human Rights: Disability Issues 1999); Professor Adell, *Labour Arbitration vs. Human Rights Code* (CLE Human Rights: Disability Issues 1999); Deborah K. Lovett, *Labour Arbitrators and Human Rights: Concurrent or Exclusive Jurisdiction?* (CLE Employment Law 1999).

- the union provides support to the employee;
- unions generally have a relatively sophisticated understanding of an employer's human rights duties and obligations towards employees;
- the collective bargaining process enables employers and unions to design dispute resolution mechanisms that best serve the workplace overall;
- the grievance process is designed generally to deal quickly and finally with workplace disputes;
- exclusive jurisdiction in labour arbitrators would effect a reduction in tribunal workload;
- workplace disputes often have both a human rights and a collective bargaining dimension.

However, there are also a number of notable disadvantages. For example, the grievance process is not equipped to deal with systemic issues or to give effect to systemic remedies. The grievance process would not provide a means for advancing and addressing broader public interest concerns underlying human rights legislation. On the contrary, it would focus only on redressing individual complaints of discrimination. The grievor does not exercise control over the grievance procedure. A difficulty also arises when the union's representational obligations create conflicts between the grievor's interests and the interests of other bargaining unit employees. While some believe that the operation of s. 12 of the *Labour Relations Code* will satisfactorily address conflict concerns, others doubt that this is a realistic expectation.¹⁴⁵ As a means of overcoming these

¹⁴⁵ By Professor Bryden in his article, *Principles for Allocating Jurisdiction Over Human Rights Claims between Labour Arbitrators and Human Rights Agencies* (CLE Human Rights: Disability Issues 1999).

¹⁴⁶ For example, Professor Adell, in his CLE Article, *Labour Arbitration vs. Human Rights Code* (CLE Human Rights: Disability Issues 1999) wrote: "A fundamental and probably inescapable problem with labour relations law is that, by its very nature, it tends to conflate the tripartite employer-union-employee relationship and the bipartite employer-union relationship. The most concrete legal response to that problem has been the implementation over the past thirty years of the union's duty of fair representation (DFR). The increasingly frequent links between anti-discrimination rights, which are vested in individuals, and the collective agreement administration process, which privileges collective rights, threaten to put very heavy pressure on the DFR both in theory and practice. Those pressures are further aggravated by the various lines of jurisprudence stemming from the Supreme Court of Canada decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, which are giving unions and the grievance arbitration process an as yet ill-defined range of new responsibilities for enforcing employee rights (and duties) previously enforced in other forums – rights under benefit plans not incorporated into collective agreements, rights and duties under defamation law and other aspects of tort law, and so on. Before saying anything about the implications of *Weber* and its offspring ... In addition to the expectation that arbitrators will generally do a fine job of enforcing human rights law (which may well be true), an important thread which runs through *Weber*, through the judgment of L'Heureux-Dubé J. in *Béliveau St. Jacques v. Fédération des employés et employés de services publics Inc.*, [1996] 2 S.C.R. 345, and through the arguments I have heard for exclusive arbitral jurisdiction over human rights complaints is a

types of conflicts, it has been suggested¹⁴⁷ that rather than "maintaining the union veto over access to arbitration and putting heavy reliance on the duty of fair representation":

... the better solution would let individual employees have assured access to arbitration,¹⁴⁸ at least on matters as important as statutory discrimination cases, subject to safeguards to discourage frivolous claims. I don't see how any other solution can be acceptable when the issues at stake are the very fundamental ones that get aired in many anti-discrimination cases ...

... [if] the human rights forum were foreclosed to unionized employees, the DFR [duty of fair representation] would assume a much more important last-resort role and would have to be elaborated far more carefully. In expressing concern about the legislative trend toward making grievance arbitration responsible for enforcing a variety of statutory rights of unionized employees, Vice-Chair Marilyn Nairn of the Ontario Labour Relations Board recently said, in George Brown College, [1998] OLRD No. 4650 (at para. 40):

... The fact remains that the duty of fair representation does not guarantee that bona fide human rights complaints will be taken to arbitration because there are a variety of circumstances related to setting, the agreement, and institutional issues which could validly support a union's decision not to take the complaint forward.

The 1994 Black Report and the La Forest Panel report both reject the idea of requiring union employees to elect whether to pursue human rights issues in the grievance or human rights

resolute optimism that the DFR will be up to arbitral jurisdiction over human rights complaints is a resolute optimism that the DFR will be up to the arbitral task of protecting individual rights in a situation where unions retain a veto over access to arbitration. On that score, however, very little about the DFR is particularly reassuring. One big problem is that DFR proceedings are essentially an elaborate sideshow. They consist largely of a battle between employee and union, although the real dispute in most cases is between the employee and the employer. As well as draining resources from the union, DFR proceedings often drag out the employer's involvement as well. For good reason, employers commonly feel obliged to participate in the DFR hearing, and if the DFR complaint succeeds, part of the remedy may be an arbitration against the employer anyway. It has always seemed to me to make more sense to ensure that the individual has access to a forum that cannot be foreclosed to him or her by the union. The human rights forum does meet that need to some extent, though very often not as efficiently as one might like. The second problem with relying on the DFR as a fallback in human rights cases, and in other cases as well, lies in the fact that it was never designed to get much traction on the merits of the underlying dispute. In theory, and most of the time in practice too, labour relations boards do not look closely at the merits of the particular grievance and at whether the union was right or wrong in dropping it. In process terms, the union only has to avoid "gross negligence", and it has to pay serious attention to the grievor's story and investigate it carefully. If it does that, and if it doesn't show any subjective ill-will toward the grievor, the union is unlikely, as I read the jurisprudence, to be found in breach of the DFR. The K.H. case discussed above may indicate a more intensive duty in disability cases, but that may not be a desirable development. Unions are, above all, collective bargaining representatives. They are not boutique law firms, and they should not have to put endless resources into litigating human rights issues."

¹⁴⁷ By Professor Adell, in his CLE Article, *Labour Arbitration vs. Human Rights Code* (CLE Human Rights: Disability Issues 1999).

¹⁴⁸ We understand that such a system may be in place in Ontario.

forum. The reasons for rejecting an election requirement rest primarily on the specialized expertise of a human rights tribunal and the range of remedies available to a complainant that an arbitrator does not have jurisdiction to grant.¹⁴⁹ An additional consideration that is linked to tribunal expertise is that a human rights tribunal is not strictly a workplace tribunal because its jurisdiction extends beyond employment discrimination matters.

Many challenge the legitimacy of such heavy reliance on a presumption that labour arbitrators lack an appropriate level of human rights expertise. The practical reality is that labour arbitrators are increasingly called upon to decide grievances that engage difficult and complex human rights issues. Important human rights principles are being shaped by review of arbitral awards as well as human rights tribunal decisions. Professor Philip Bryden, in his article, *Principle for Allocating Jurisdiction Over Human Rights Claims between Labour Arbitrators and Human Rights Agencies* (CLE Human Rights: Disability Issues November 1999) observed that:

... there is no compelling reason to believe that reliance on labour arbitrators to play a major role in human rights adjudication will compromise the quality of human rights decision-making.

In their article, *Enhancing Internal Responsibility for Human Rights Protection: The Workplace Committee Model and Use of Inquiry Powers to Address Discrimination* (February 2000),¹⁵⁰ Lyle Fairbairn, Q.C. and Margot Priest make the point that:

While the training of labour arbitrators in interpreting human rights law may be uneven, experience in interpreting this area of law is now virtually a job requirement for labour mediators, arbitrators and conciliators. Arbitrators have been cautioned by the courts to interpret collective agreements with human rights statutes in mind. The Saskatchewan Court of Appeal overturned one arbitrator's award for failing to do so.

Conversely, it should not be presumed that HRT members lack an appropriate level of labour relations expertise. To illustrate the point, the current HRT chair practiced for many years with a national law firm in the areas of labour, employment, human rights and pay equity before accepting appointments, first as vice-chair of the Ontario Employment Equity Tribunal, the Human

¹⁴⁹ As Ms. Zwack points out in her article, *supra*: "... the fact that somewhat different remedies are available in different forum has not generally stopped the courts from holding that individuals or groups may not pursue the same claim under different statutory schemes. See, for example, *McBurney v. Employment Standards Branch of B.C.* (1988) 33 B.C.L.R. (2d) 320, in which the Court of Appeal held that employees could not pursue unpaid wages under both the *Labour Relations Code* and the *Employment Standards Act*, although the remedial mechanisms for recovery were different. Further, this concern could be dealt with by giving arbitrators the authority to award all remedies available under the *Human Rights Code* in situations where a grievance raises issues under that legislation".

¹⁵⁰ Prepared for the La Forest Panel.

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Rights Board of Inquiry, and the Pay Equity Hearings Tribunal; second as the chair of the latter two tribunals; and, more recently, as the chair of the HRT.¹⁵¹

While reasonable people may disagree on whether labour arbitrators are sufficiently well equipped to interpret and apply human rights legislation, there is surely no compelling reason to believe that the HRT would have any greater fact-finding or adjudicative expertise than labour arbitrators. Additionally, while some labour arbitrators may not be legally trained, there is also no statutory requirement that HRT members have legal expertise under the Code.¹⁵² It is reasonable to expect, however, that a permanent adjudicative body like the HRT that is charged with responsibility of adjudicating human rights issues will have a greater relative expertise in respect of human rights legal principles.

One way to address concerns of relative expertise would be to expand the grounds for appeal to the Labour Relations Board to cover error in the interpretation or application of human rights principles and to establish a form of "cross-appointment" between the Labour Relations Board and the HRT. For example, one or two members of the HRT could also be appointed members of the Labour Relations Board. Where a ground of appeal to the Labour Relations Board included an error in the interpretation or application of human rights principles, the HRT member could participate in the appeal proceedings in his or her capacity as Labour Relations Board member.

Alternatively, grievance awards raising human rights issues could be appealed directly to the HRT. This would require amendments to both the *Labour Relations Code* and the Code. Such a model was suggested by Andrea Zwack in her CLE article, *Some Issues in the Interaction of Human Rights and Labour Law Processes* (CLE Human Rights '97):

While it is clearly not satisfactory for the Labour Relations Board to hear appeals of arbitration awards dealing with human rights issues, then, neither is it satisfactory to have such appeals go directly to the Court of Appeal. From the perspective of best advancing the statutory scheme, the ideal situation would appear to be if appeals from arbitration decisions dealing with human rights issues were to go to the Human Rights Tribunals. Not only would this ensure that the Human Rights Tribunal were able to play its designated role of overseeing the development of human rights norms and jurisprudence in the province, but it

¹⁵¹ Heather M. MacNaughton was appointed as Chair of the B.C. Tribunal on August 1, 2001, following a national search. Before she was appointed the Vice Chair of the Ontario Human Rights Board of Inquiry, the Pay Equity Hearings Tribunal and the Employment Equity Tribunal, she had been a partner with the law firm of Lang Michener Lawrence & Shaw. Following the latter appointments in 1995, Ms MacNaughton was appointed Chair of the Human Rights Board of Inquiry (October 1998) and the Chair of the Ontario Pay Equity Hearings Tribunal (January 1998). She holds both a law degree (1982) and masters of law (1998) (civil litigation and ADR) from Osgoode Hall Law School.

¹⁵² In the past, persons have been appointed to the HRT (and the predecessor Council) who do not have legal training. At present, however, all of the HRT members have law degrees.

would render largely moot many of the concerns discussed in the preceding section of this paper which are presently seen to mandate the availability of multiple proceedings at first instance. That is, if appeals of arbitration awards go to the Human Rights Tribunal, there would be no need to be concerned that arbitration proceedings might not adequately deal with the issues or provide all available remedies. Arbitrators could be empowered to provide all available remedies under the Human Rights Code, and/or such issues could be remedied on appeal.

While this approach is logically appealing, it may not be practicable at this early stage in the existence of the Human Rights Tribunal. For such an appellate or review process to be viewed as legitimate in the eyes of the labour relations community may require that the Human Rights Tribunal establish itself more firmly as a measured, efficient and authoritative voice on human rights issues in the province. Ironically, the achievement of expertise and authority by the Tribunal may be somewhat hampered by the fact that many of the foremost human rights issues in the province may be decided by a combination of grievance arbitrators and the Court of Appeal. In the meantime, it is to be hoped that the Human Rights Commission and Tribunal will exercise with some strength of purpose the power they have been given through [sections 25 and 27] of the Code to control its own docket and encourage the resolution of complaints through single proceedings so as to conserve resources and enhance certainty and finality for the parties to complaints.

If identity (as distinct from appropriateness) of available remedies is not an imperative, then a labour arbitrator's remedial authority overall would likely satisfy broad policy concerns. In any event, as Ms. Zwack observes, concerns about the fact that a labour arbitrator's remedial powers may not be as extensive as those of the HRT could be addressed in part by legislative amendment. Additionally, the point has been made¹⁵³ that:

... It is worth remembering that the arbitrator may well have remedial authority over an aspect of the dispute that is not covered by human rights law (for example, whether there has been a breach of a right protected by the collective agreement) and that this may make the arbitrator's remedial authority superior overall to that of the Tribunal.

The advantages and disadvantages of requiring an election by the employee have been fully explored in the La Forest Report. In contrast to the notion of exclusive jurisdiction for either labour arbitrators or the HRT, an election would preserve the existing concurrent jurisdiction framework, facilitate employee control over the complaint and enable that employee to choose to pursue broader systemic remedies in appropriate cases as well as individual remedies. It would also enable the employee to bring her complaint against both the employer and the union in appropriate cases.

¹⁵³

By Professor Bryden in his article, *Principles for Allocating Jurisdiction Over Human Rights Claims between Labour Arbitrators and Human Rights Agencies* (CLE Human Rights: Disability Issues 1999).

Other Contexts

Outside the collective agreement context, problems of concurrent or overlapping jurisdiction between different tribunals or between the HRT and employer or service-provider anti-discrimination policies and procedures could be addressed by a model of exclusive jurisdiction or statutorily imposed elections.

Alternatively, the Code could provide the HRT with the statutory powers that it would need to dismiss complaints that are, have been or could have been the subject of another adequate alternate process. Some models for these types of provisions are found in legislation in other Canadian jurisdictions and have been identified already in the Background Paper. The HRT could also be given broad complaint dismissal powers including a discretionary and continuing jurisdiction to dismiss complaints where the core subject matter of a human rights complaint can be, is being or has been dealt with in another forum. Such a provision could direct the HRT to exercise its jurisdiction taking into account the interests of fairness and finality as well as cost, resource and consistency concerns. While there are some who would advocate in favour of a restricted ability in the HRT to dismiss complaints in these circumstances (including Black in his 1994 Report), allowing the HRT to exercise its best judgment having regard to all of the competing concerns would ultimately serve to better enhance its integrity and credibility.

CHAPTER VIII: UNREASONABLE DELAY IN THE PROCESSING OF HUMAN RIGHTS COMPLAINTS

Historical Context

The proposition that justice delayed is justice denied originated with reference to civil and criminal judicial systems, and it has become equally fundamental to administrative law. The following paragraphs from a 1995 report on the civil justice system in the United Kingdom,¹⁵⁴ are but one illustration of the centrality and enduring nature of delay as a civil justice system issue:

1. Throughout the common law world there is acute concern over many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. They concern the processes leading to the decisions made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system.

¹⁵⁴ Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, 1995 (the Woolf Report), at p. 4.

2. The problem is not a new one. There have been many attempts to address it. Since 1851 there have been some 60 reports on aspects of civil procedure and the organization of the civil and criminal courts in England and Wales. The most recent report on the civil justice as a whole was the Civil Justice Review which was established in February 1985 with the following terms of reference:

"To improve the machinery of civil justice in England and Wales by means of reforms in jurisdiction, procedure and court administration and in particular to reduce delay, cost and complexity."

In criminal and quasi-criminal justice systems, the right to trial within a reasonable time is an especially fundamental principle that has been constitutionally entrenched in s. 10(b) of the *Charter*. While the primary focus of s. 10(b) is on the interests of accused individuals, it is now clear that this protection also encompasses a community and societal component. In *R. v. Askov*,¹⁵⁵ Cory J. described that component, in part, in the following terms:

¶ 44 ... That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly....

...

¶ 47 The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delays.

A detailed review of the genesis of administrative law is beyond the scope of this background paper. It should be noted, however, that the development of delay as an issue within the field of administrative law has reflected the fact that administrative law itself is relatively new on the legal landscape. As stated by Robert W. MacAulay and James L.H. Sprague in *Practice and Procedure Before Administrative Tribunals* (Carswell, 1997-2001) at pp. 1-4 to 1-5:

The political system that guided this country from Confederation through its first century has required rehabilitation. Administrative bodies created by novel legislation grew rapidly in the sixties and seventies to supplement Parliament, the legislatures and the courts. Arguably, in altering the blue print of the legal mechanisms, a whole new machine was created, albeit in an unplanned fashion.

¹⁵⁵ [1990] 2 S.C.R. 1199.

The evolution of delay as an administrative law issue can be followed through the modern proliferation of administrative agencies and the coming of age of the law that has grown up to govern them. Expedient process was long recognized as a necessary component of justice systems. It was therefore not surprising that as administrative justice emerged from its infancy so too did the commentary and jurisprudence about its timeliness. That evolution would need to resolve the relationships between delays in administrative justice, administrative law fairness concepts, constitutional law concepts of fundamental justice, and the supervisory authority of superior courts over administrative agencies and decision-makers.

While more will be said later about the Supreme Court of Canada's decision in *Blencoe v. British Columbia (Human Rights Commission)*,¹⁵⁶ the following passage from the judgment of LeBel J. (dissenting in part) traces the history of the common law's abhorrence of delay as it relates to the development of judicial powers to monitor the processes of administrative bodies:

¶ 146 The notion that justice delayed is justice denied reaches back to the mists of time. In Magna Carta in 1215, King John promised: "To none will we sell, to none will we deny, or delay, right or justice" (emphasis added). As La Forest J. put it, the right to a speedy trial has been "a right known to the common law ... for more than 750 years" (*R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 636). In criminal law cases, this Court had no difficulty determining in *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1227, that "the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the Charter". Outside the criminal law context, legislators have devised limitation periods, and courts have developed equitable doctrines such as that of laches. For centuries, those working with our legal system have recognized that unnecessary delay strikes against its core values and have done everything within their powers to combat it, albeit not always with complete success.

¶ 147 Under the common law, courts have gradually developed the power to monitor the processes of administrative bodies and their legality. There is today no doubt that "[t]he superior courts have the inherent power to review the legality of administrative actions" (*D. P. Jones and A. S. de Villars*, *Principles of Administrative Law* (3rd ed. 1999), at p. 6). Unnecessary delay is not excluded from the scope of judicial review.

¶ 148 This supervisory power over administrative processes developed from the very beginnings of the prerogative writ most apropos in the case before us. *Mandamus* is a storied writ. At its origins, it empowered the Court of King's Bench to order a court or an administrative body to do its duty: *W. Holdsworth*, *A History of English Law* (7th ed. 1956), vol. I, at p. 229; *Sir W. Blackstone*, *Commentaries on the Laws of England* (4th ed. 1768), Book III, at p. 110. In the original cases that recognized it, the writ was used largely to prevent the procedurally illegitimate exclusion of citizens who were members of certain disliked groups from municipal offices: see *Bagg's Case* (1615), 11 Co. Rep. 93b, 77 E.R. 1271; and *Andover Case* (1700), *Holt*. K.B. 441, 90 E.R. 1143, at p.

¹⁵⁶ [2000] 2 S.C.R. 307.

1143. But there was always the possibility of something much greater in the writ, and Lord Mansfield would go so far as to announce its prospective use "upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one" (*R. v. Barker* (1762), 3 Burr. 1265, 97 E.R. 823, at pp. 824-25 (emphasis added). Cf. *Bagg's Case*, supra, at pp. 1277-78, referring generally to "misgovernment".) The writ always promised the possibility of ensuring that governmental officers would not shirk their duty to keep processes operating efficiently. Perhaps significantly, the very words of the original form of the writ referred to "debitam et festinam justiciam" -- due and speedy justice (*Holdsworth*, supra, app. XV, at p. 659).

V. Modern Developments

¶ 149 Today, there is no doubt that mandamus may be used to control procedural delays. In the middle of the last century, a British Columbia Court of Appeal judgment recognized the principles behind mandamus, stating that "[t]he high prerogative writ of mandamus was brought into being to supply defects in administering justice" (*The King ex rel. Lee v. Workmen's Compensation Board*, [1942] 2 D.L.R. 665, at p. 678). It went on to note that the granting of mandamus was "to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice" (at p. 678, cited with approval in *Harellkin v. University of Regina*, [1979] 2 S.C.R. 561). Members of our Court have on occasion alluded to the use of mandamus specifically to control delay. (See notably: *R. v. Bradley*, [1941] S.C.R. 270, at p. 277, per Duff C.J.; *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, at p. 1027, per Laskin C.J.; and *Rahey*, supra, at pp. 624-25, per Wilson J., and p. 631, per La Forest J.) And there exists a specific line of case law in the administrative context of immigration law that endorses just such a development, particularly where delay creates hardship: e.g., *Muia v. Canada* (Minister of Citizenship and Immigration) (1996), 113 F.T.R. 234; *Dass v. Canada* (Minister of Employment and Immigration), [1996] 2 F.C. 410 (C.A.), at para. 24; *Dee v. Canada* (Minister of Citizenship & Immigration) (1998), 46 Imm. L.R. (2d) 278 (F.C.T.D.); and *Kiani v. Canada* (Minister of Citizenship & Immigration) (1999), 50 Imm. L.R. (2d) 81 (F.C.T.D.), at para. 34. In such a context in *Bhatnager v. Minister of Employment and Immigration*, [1985] 2 F.C. 315 (T.D.), at p. 317, Strayer J. offers this widely quoted statement:

But mandamus can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. [Emphasis added.]

¶ 150 The common law system has always abhorred delay. In our system's development of the courts' supervisory role over administrative processes through mandamus, we see a crystallizing potential to compel government officers to do their duty and, in so doing, to avoid delay in administrative processes. The historical context in which our case law is rooted is a soil of well-established principle. This ground's more modern seedlings must now be examined.

VI. Undue Delay and Procedural Fairness

¶ 151 English case law began in the last decades to bring these old streams of the common law together. In *R. v. Secretary of State for the Home*

Department, *Ex parte Phansopkar*, [1976] Q.B. 606, the English Court of Appeal was prepared to act against unreasonable delay based on the Magna Carta itself, as reinforced by the European Convention on Human Rights. In *Re Preston*, [1985] A.C. 835, the House of Lords made clear that there could be judicial review of any delay amounting to an abuse of power or breach of natural justice. In *R. v. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] 1 Q.B. 424, the English Court of Appeal applied this to a lengthy delay in notifying police officers of disciplinary charges against them. In the judgment of May L.J., at pp. 439-40, this was abusive and a breach of fairness because it disregarded the possibility of prejudice accruing to the officers on account of the delay. Unreasonable delay in administrative processes triggers the ancient rights of individuals who suffer prejudice as a result, and it gives the courts good reason to intervene against injustice. The modern English position, stated by W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at p. 649, is clear: "A statutory duty must be performed without unreasonable delay, and this may be enforced by mandamus" (emphasis added).

Human Rights Context Leading Up to the *Blencoe* Case

By the mid to late 1980s, Canadian courts and tribunals were already on their way to crafting remedies for abuse of process arising from delay in administrative processes,¹⁵⁷ and by the early 1990s, delay in human rights complaint processes was being experienced and described in crisis terms.¹⁵⁸ The high profile insider trading case against a former premier, *Bennett v. British Columbia (Securities Commission)*,¹⁵⁹ had put delay prominently on the administrative law map in British Columbia, and connected the issue to a constitutional claim of breach of fundamental justice under s. 7 of the *Charter*. The following notes from a 2000 article by Robert E. Hawkins on delay in human rights processes¹⁶⁰ outline the discontent with process delays that was boiling to the surface in tribunal and lower court judicial decisions:

Note 8: See Brock University v. Ontario (Human Rights Comm) (1996), 91 O.A.C. 71 at 75...where MacFarland J. stated, "[t]he delays in this case are appalling and inexcusable; and Great Atlantic & Pacific Co. of Canada v. Ontario (Human Rights Comm.) (1993), 13 O.R. 824 at 832 (Div. Ct.)...where the Court observed, "[f]or some years now, this court has found it necessary, on occasion, to express its concern for the extent of the delay involved in proceeding under the Code."

¹⁵⁷ See *Misra v. College of Physicians and Surgeons* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.).

¹⁵⁸ See *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask.C.A.) (4 year delay); *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man.C.A.) (3 year delay); *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [1996] 1 F.D. 638 (Fed. C.A.) (4 year delay).

¹⁵⁹ (1991), 82 D.L.R. (4th) 129 (B.C.S.C.); (1992), 94 D.L.R. (4th) 339 (B.C.C.A.).

¹⁶⁰ *Reputational Review III: Delay, Disrepute and Human Rights Commissions* (2000), 25 Queen's L.J. 599.

Note 9: See Khalil v. Ontario College of Art (1997), 31 C.H.R.R. D/121 at para. 56 (Ont. Bd. Inquiry)...where the board stated, "[t]here has been a growing body of jurisprudence on this issue due, in large part, to the fact that complaints filed under the Code have historically been subject to lengthy delays for various reasons"; Drummond v. Tempo Paint and Varnish Co. (1994), 24 C.H.R.R. D/341 at para. 22 (Ont. Bd. Inquiry)..., where Adjudicator Laird characterized the delay as "disgraceful"; Naraine v. Ford Motor Company (1994), 24 C.H.R.R. D/457 at para. 32 (Ont. Br. Inquiry)..., where Adjudicator Backhouse stated, "[t]he delays are reprehensible"; Baptiste v. Napanee and District Rod & Gun Club (1993), 19 C.H.R.R. D/246 at para. 24 (Ont. Bd. Inquiry)..., where Adjudicator Omatsu voiced her concerns: "Needless to say, I am very concerned that a period of five years has transpired before the hearing of this complaint"; Simms v. Seetech Metal Products (1993), 20 C.H.R.R. D/477 at para. 24 (Ont. Bd. Inquiry)...where Adjudicator Cumming said, "[i]t should be possible to develop a dispute resolution mechanism that could at minimal cost making binding determinations on human rights issues expeditiously" and Ghom v. Domtar Inc. (No. 1) (1988), 10 C.H.R.R. D/5968 at para. 43191 (Ont. Bd. Inquiry), where Adjudicator Pentney referred to the delay as "undoubtedly regrettable" and indicated he was "greatly troubled" by it.

By the early 1990s, it was only a matter of time before the jurisprudence fully caught up with, and responded to, the delays that were plaguing human rights complaint systems across Canada.

The stage was set for the journey toward the Supreme Court of Canada's decision in the *Blencoe* case.

Our summary of Black's 1993 and 1994 reports describe a climate in which both complainant and respondent groups were complaining of delay in the processing of human rights complaints.¹⁶¹

The average time to hearing in British Columbia was three years and the process was characterized by delay at all stages: intake, investigation, disclosure, before and after referral to hearing, and after hearing completion. In 1994 Black believed that some of his recommendations for structural and administrative reform would help speed up the process in British Columbia: early streaming of some cases for quick resolution or dismissal, removing the investigative function from Employment Standards Officers and placing it with a HRC, giving investigators power to compel information, and instituting pre-hearing disclosure and pre-hearing conferences. He also recommended that the following time limits be imposed by statute:

- investigator assigned within 15 days of complaint being filed and within 30 days of initial request to file a complaint, not counting delay due to conduct of the complainant;
- investigation completed no later than 100 working days after filing of complaint;
- parties given 30 working days to comment on completed investigation report, unless special circumstances require more time in the interests of fairness;

¹⁶¹

1994 Black Report, p. 142.

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- referral decision within further 30 working days after completion of investigation report;
- hearing within 60 working days after referral, unless parties consent otherwise or despite diligent preparation for hearing the interests of fairness require a longer period;
- decision issued within 60 working days of completion of hearing.¹⁶²

Black acknowledged that there would be circumstances in which it would be legitimate to extend statutory time limits and that safeguards should be built in to prevent misuse, particularly where the "fault" for the delay lay with one of the agencies and not the parties. To accomplish this, he proposed that the HRC and HRT would be empowered to grant time extensions in writing with reasons. A report on time extensions would be required to be included in the annual reports of these agencies and all time extensions not granted on consent of the parties would also be required to be reported to the Ombudsman for oversight.¹⁶³

While many of the structural changes recommended in the 1994 Black Report (such as the creation of the HRC, the HRT, and the positions of CC, CIM, and DCC within the HRC) were instituted when the *Human Rights Act* was amended in January 1997, the proposals for statutory time limits did not go forward. Delay problems identified by Black continued with the establishment of the HRC and the HRT in 1997, and remained a serious concern at both agency levels. No major initiatives attacked the backlog of cases with effect until well after the two human rights complaints against Blencoe got underway in mid 1995. The structures functioning from that time until late 1997, when Blencoe commenced his court action, failed to prevent lengthy HRC process delays in his factually and legally simple case.

The Blencoe Decision

The case of *Blencoe v. British Columbia (Human Rights Commission)* concerned two complaints of sex discrimination (sexual harassment) filed in July and August 1995. The incidents of sexual harassment were said to have occurred over two years from March 1993 to March 1995, during which time Blencoe had been a Cabinet minister. The allegations had been made public before the complaints were filed. In the midst of intense media attention and political debate in respect of the complaints, the Premier announced that he no longer had confidence in Blencoe who was removed from Cabinet and subsequently dismissed from the NDP caucus. He had considerable difficulty obtaining employment in British Columbia and elsewhere and commenced judicial review proceedings in November 1997 seeking to have the complaints against him dismissed

¹⁶² 1994 Black Report, at pp. 143-144.

¹⁶³ 1994 Black Report, at pp. 144-145.

because of unreasonable delay. Blencoe argued that the prejudice he and his family suffered as a result of the delay in processing the complaints against him was tantamount to an abuse of process, as well as a denial of his s. 7 *Charter* rights to "liberty" and "security of the person" in a manner that did not accord with principles of fundamental justice.

Speaking for the majority, Bastarache J. said that he did not doubt parties to human rights sex discrimination complaints would experience a level of stress, anxiety and stigma. However, he concluded that the scope and protection of "liberty" and "security of the person" in s. 7 of the *Charter* does not extend to "such emotional effects":

¶96 ... If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be "stigmatizing". The Commission's investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is not "stigmatizing" state pronounced as to his "fitness" that would carry with it serious consequences such as those in *G.(J.)*. There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to "liberty" or "security of the person".

The Court then addressed the question of whether, applying administrative law principles, the delay at issue amounted to a denial of natural justice. Administrative law principles had established that undue delay in the processing of an administrative proceeding can irreparably impair the fairness of a hearing where there is proof of substantial prejudice attributable to such delay.¹⁶⁴ Bastarache J. expanded upon that principle in this way:

¶115 ... *unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this*

¹⁶⁴

In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43 (Q.L.) Le Bel J., speaking for the minority (dissenting in part), said (at ¶ 154) that "[a]busive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes and its effects is abusive and contrary to the administrative law principles that exist and should be applied in a fair and efficient legal system". To a similar effect, Mr. Justice Hollinrake observed that "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little importance": *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (C.A.) at para. 22.

threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly cause a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us in deciding what is an "unacceptable delay" that amounts to an abuse of process.

He concluded that the delay at issue was "not such that it would necessarily result in a hearing that lacks the essential elements of fairness".¹⁶⁵ While unacceptable delay may amount to an abuse of process in certain circumstances, even where the fairness of the hearing has not been compromised, the delay at issue was not "unacceptable"; it was "not so inordinate or inexcusable as to amount to an abuse of process", nor was it one that would "offend the community's sense of decency and fairness".¹⁶⁶ Bastarache J. was nonetheless acutely concerned about the delays and inefficiencies that had occurred in the processing of the complaints against Blencoe:

¶135 Nevertheless, I am very concerned with the lack of efficiency of the Commission and its lack of commitment to deal more expeditiously with complaints. Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commission experience serious delays will not justify breaches of the principles of natural justice in appropriate cases. In R. v. Morin, [1992] 1 S.C.R. 771, at p. 795, the Court stated that in the context of s. 11(b) of the Charter, the government "has a constitutional obligation to commit sufficient resources to prevent unreasonable delay". The demands of natural justice are apposite.

Le Bel J., speaking for the minority (dissenting in part), took an even more expansive view of when administrative delay would constitute abuse and qualify for a legal remedy:

¶ 154 ...[a]busive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes and its effects is abusive and contrary to the administrative law principles that exist and should be applied in a fair and efficient legal system".¹⁶⁷

Le Bel J. concluded Blencoe faced unreasonable delays that violated administrative law principles of fairness in the management of the HRC's processes. In part, this conclusion was driven by the type of complaints at issue; complaints that were not factually or legally complex

¹⁶⁵ At ¶104.

¹⁶⁶ At ¶132.

¹⁶⁷ To a similar effect, Mr. Justice Hollinrake observed that "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little importance": *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (C.A.) at para. 22.

and turned primarily, if not exclusively, on questions of credibility. LeBel J.'s judgment was highly critical of the HRC's conduct of its procedures, as the following passages highlight:

¶166 *Recognizing that this case is far less complex than many other sexual discrimination cases does not alleviate the seriousness of the allegations, but it is clear from the record that the allegations were not of a nature that could justify prolonged investigation. Ultimately, the case was about a "he said/she said" scenario concerning which there should have been an adjudication. In this sense, there was little or nothing to investigate, and there was no reason for the pre-hearing investigation to take a long period of time.*

¶167 *Lowry J. expressed serious misgivings about the delays in this case. He wrote at para. 46:*

It may well be that the structure of the Commission should be such that, given the nature of the complaints made by Ms. Schell and Ms. Willis, two years would not be required to determine that they warrant a hearing.

While Lowry J. went on to attribute the delay to a lack of resources, he questioned the effectiveness of the Commission, and his finding that two years was an inappropriately long time confirms my conclusion on this branch of the analysis. The inherent time requirements in this case were minimal.

¶168 *By contrast, the time taken was anything but minimal. After five to six months spent on determining that it would hear the complaints, and once Blencoe had a chance to respond, the Commission then mysteriously took the five months from April 1996 to September 1996 to appoint the same investigator who had been working on the file all along despite having told Blencoe that it expected to do so within two months ... The investigation took some four months ... after the conclusion of the investigation, it apparently took the investigator another two months to write and forward a 12-page report in early March 1997, and this only after letters from Blencoe's lawyer asking about the delay ... After another four months, in July 1997, the Commission finally told Blencoe that the matter would proceed to a Tribunal hearing. It then took another two months to get a date set for the hearing, which was scheduled to be some six months later in March 1998. In all, the time for the Commission to make the determination that the complaints should go to a scheduled hearing was approximately 32 months. While it is true that the Commission's decision to send the matter to a hearing involved a number of steps, every one of those steps involved significant delay.*

¶169 *A particularly egregious example of the Commission's unacceptable lack of diligence may be found in the events during the period from October 16, 1995 to December 21, 1995. During that time the Commission breached procedural fairness by failing to send to Blencoe Willis's October 16 response to his submissions on the timeliness of her complaint. In response to an inquiry, Blencoe received the Commission's letter dated December 21 on December 27. Although the December 21 letter denied that a decision had been made on this issue, a January 22, 1996 letter revealed that the Commission had actually already made the decision on December 18, before it even sent Blencoe the documents to which he had wished to reply and that the Commission had possessed for three months ... The Commission essentially failed even to keep those affected by its decisions up to date with what was going on.*

¶170 Regardless of any arguments that parts of the time were necessary for procedural safeguards, the facts are that the Commission was slow at every step of the way. This eventually added up to a delay measured in years for a decision that was not inherently complex. Although a few letters back and forth might have been appropriate, nothing in the inherent time requirements of the case came close to requiring the delay concerned.

...

¶173 A further measure of the Commission's behaviour with respect to delay is that even at the Supreme Court of Canada, the Commission admits that it cannot explain what was going on for five months of the time it was dealing with the allegations against *Blencoe*. On a matter that ideally should not have even taken five months, a five-month period of unexplained delay remains surprising and troubling ... In other words, in five months, nothing happened. This five-month lapse is just the high water mark of the Commission's ineptitude.

...

¶177 It is true that administrative delay was not the only cause of the prejudice suffered by the respondent. Nevertheless, it contributed significantly to its aggravation. It must be added, though, that this delay also frustrated the complainants in their desire for a quick disposition of their complaints. Finally, the inefficient and delay-filled process at the Commission linked with the specific blunders made in the management of those particular complaints harmed all parties involved in this sorry process. Its flaws were such that it may rightly be terms to have been abusive in respect of the respondent ...

While the court's remarks were directed at the HRC,¹⁶⁸ the *Blencoe* case illustrates the legal significance and consequence of delay in the conduct of both the HRC and the HRT procedures to the fairness of the complaint process. Prolonged or unnecessary delay ill-serves the parties to this process and undermines the integrity, reputation and thus effectiveness of these two agencies. Delay is generally seen as an indicator of internal inefficiencies in the management and processing of complaints. It may also be a manifestation of a lack of adequate resources and staff training or a combination of all of these factors.

At one level, one can look at the *Blencoe* case as a confirmation of the importance of human rights and the preservation of a path for their vindication. Faced with alarming process delays that it considered a significant and unjustified burden for all parties, both the majority and the minority of the Court ultimately weighed the case in favour of allowing the complaints to go forward. The HRC complaint structure swayed but it did not fall, and those complainants did get the opportunity to have their complaints heard and decided. However, it was also a Pyrrhic victory for the HRC. The HRC continues to maintain that the *Blencoe* case was entirely attributable to a lack of resources. But when all was said and done about some of the time spent being justifiable and

¹⁶⁸ While the Court refers only to the HRC, the delay at issue concerned a period of time that included the time from referral to the HRT to the hearing date.

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some of it being the responsibility of Blencoe and about the ever present issue of more institutional resources, there emerged a system that occupied itself for many months, with the "investigation" of legally and factually simple complaints. Those complaints turned largely on the credibility of witnesses and inherently did not lend themselves to resolution through investigation. The notoriety of the allegations was burdensome and damaging to the complainants and respondent alike. In truth, these were the kinds of complaints that cried out for speedy resolution, a "fast track" that either did not exist or for which these cases were not selected.

It must not go unsaid that, since the events in *Blencoe*, the HRC has instituted significant process improvements, many of them directed at overcoming and avoiding unacceptable case "backlogs". The results of those recent initiatives are discussed elsewhere in this background paper. Given the persistent, historical drag of the problem of process delay, however, it would appear that what is required is not just a system that has the capability to be expeditious, but one that is actually delay resistant at both legislative and administrative structural levels.

Some Views on the Problem of Delay

The 1995 Ontario LRC Report canvassed significant dispute resolution process delay problems in the context of workplace tribunals, including the Ontario Human Rights Commission. The Ontario LRC Report suggested two means for reducing delay and inefficiencies:¹⁶⁹ (a) a modification of the internal procedures of the tribunals; and (b) an elimination of the "phenomenon of multiple proceedings arising from a single dispute". The modifications suggested were:

- implementation of case management systems;
- implementation of a mediation program (to be tested by a pilot program);
- authorization of tribunals to dismiss cases without a hearing.¹⁷⁰

The Ontario LRC also made the following additional recommendations:

In order to ensure that tribunals interpret and apply external law competently, the Commission also recommends that a system of training take place so that adjudicators in one administrative regime become familiar with the law of other related regimes. In addition, the Commission recommends that tribunals have (i) the ability to hold consolidating hearings, (ii) the ability to request a legal opinion from another tribunal, and (iii) the ability to make findings of fact in the event a

¹⁶⁹ Executive Summary, p. 1.

¹⁷⁰ Under the Code, the CIM has the ability to dismiss complaints without a hearing and he may do so on the basis that the human rights issues are being or have been appropriately dealt with in another forum. This aspect of the CIM's powers is discussed in greater detail elsewhere in this background paper.

*dispute is transferred to another tribunal for adjudication. Finally, in order to ensure that a party has all remedies available and the party does not get compensated more than once for the same injury, recommendations are made with regard to the compensation principles that should be applied in cases where more than one statute is applied by a single tribunal.*¹⁷¹

In her 1996 article on reforms to administrative justice in Ontario,¹⁷² Margot D. Priest identified the coordination of decision-makers, case management and data collection, generic hearings and policy hearings, rule-making and alternative dispute resolution as general techniques for better management by decision-makers, reduction of delay and reduction of inconsistencies in decision-making.¹⁷³ Of the Ontario Human Rights Commission specifically, she observed that:

*The OHRC has been subject to public criticism because of its delay in processing files and completing investigations. Because of the nature of the jurisdiction, delays can cause severe distress and, for some, the remedy may be too late. An individual dying of AIDS is not helped by an investigator's finding of discrimination in accommodation if death occurs first. The Commission has therefore been putting a high priority on decreasing its backlog. In 1990, it initiated its Case Management Plan (CMP), which involved improving training for investigators, setting productivity standards and limiting their caseloads to a maximum of ten at any one time. It set up a task force to deal with 400 of the oldest cases. In 1991 the government allocated \$10 million to the Commission to deal with the backlog and the task force was expanded. It was given a one-year mandate to deal with formal complaints that were more than six months old and not under investigation. The Human Rights Commission is also part of the model integrated case management program being developed under the aegis of the Management Board Agency Reform Project.*¹⁷⁴

Priest also identified the following issues as requiring further examination:

- There has been a great deal of concern expressed about delays: The case management process does not appear to involve any "triage" at the earlier stages to distinguish among cases of varying seriousness: all discrimination appears to be treated equally. There is a possible lack of focus on systemic discrimination.
- The high rates of settlement raise questions of the exercise of discretion by staff determining the terms and conditions of settlement.

¹⁷¹ Executive Summary, p. 2.

¹⁷² *Fundamental Reforms to the Ontario Administrative Justice System*, published by the Ontario Law Reform Commission in *Rethinking Civil Justice: Research Studies for Civil Justice Review* (Toronto, December 1996), p. 545.

¹⁷³ At pp. 612 to 619.

¹⁷⁴ At p. 601.

- There are possible conflicts between the role of the Commission official as investigator and as mediator, in addition to the conflict that may occur later when the Commission is responsible for the "prosecution" of the case before the Board of Inquiry. Should the mediation function be institutionalized separately within the Commission in the manner of the Insurance Commission mediation? Should parties have an opportunity to move to more formalized mediation more quickly after the initial investigation has established that the complaint is not trivial, frivolous, etc.?
- Is a process where only four percent (or fewer) of formal complaints are actually referred to adjudication by a Board of Inquiry and only a quarter of those are subject to a decision, with reasons, by the Board an efficient process?
- The relationship of the mandate of the Commission to the mandates of other tribunals, such as the Labour Relations Board or the Pay Equity Tribunal is unclear; there is a possible overlap or complementary of function and mandate.¹⁷⁵

She identified the issue of appointments as being "at the heart of any reform to the system, including the reform of its reputation".¹⁷⁶ She wrote that "[a]ppointments have been identified as critical to the success of the system by all or most of the studies of administrative justice in the past thirty years. The recommendations have focused on reforms to the process of appointment to ensure that individuals appointed to the administrative justice system agencies are 'competent'".¹⁷⁷

She also canvassed some of the delays experienced in Ontario at the adjudicative stage of the human rights complaints process¹⁷⁸ and raised the following issues for further consideration:

- The implications of case law being established by a tribunal of part-time members dealing with only a very small percentage of complaints made to the Commission should be examined; there are no institutional processes or guidelines to ensure that the Board deals with the most serious or precedent-setting cases; there may be problems of

¹⁷⁵ At p. 602.

¹⁷⁶ At p. 624.

¹⁷⁷ The subject of appointments is outside the scope of this Human Rights Review background paper, but will form the subject of a separate review as part of the Administrative Justice Project.

¹⁷⁸ See pp. 603-604. In 1994/95 the average time from referral of the complaint to a Board of Inquiry and the release of its decision was one year. The time from the filing of the complaint to decision might be several years. The average hearing lasted ten to fifteen days. Under the Ontario Code, boards of inquiry are required to make their findings and release their decisions within 30 days of the hearing.

consistency when cases are rarely adjudicated and an overwhelming proportion of cases are settled.

- The implications of the Management Board Agency co-location and rationalization project require examination; are efficiencies being obtained?
- Is there adequate coordination of policy/education function of Commission and precedential implications of Board decisions?
- In light of the delays getting cases to the Board, could the Board serve other functions, including dealing with interim orders (akin to injunctions) pending either additional investigation or opportunities for further settlement negotiations?

Delays in the adjudicative stage under the Ontario Code are addressed in part by a statutory requirement that decisions be released within 30 days of the hearing. Additionally, the six part-time vice-chairs of the Ontario Board of Inquiry are cross-appointed to the Pay Equity Tribunal and the Employment Equity Tribunal.

CHAPTER IX: IMPROVEMENTS IN PROGRAM AND SERVICE DELIVERY

Background

Like all human rights commissions and tribunals, the HRC and HRT have faced sustained public criticism of and dissatisfaction with their services and processes and have attempted to grapple with problems of delay and other inefficiencies within their respective budgetary constraints. In recent years, the HRC and HRT have worked on improving the effectiveness and efficiency of their respective processes.

A comparison of the statistics between 1996 and 2001 reflect a significant increase in the number of complaints screened out following investigation.¹⁷⁹

Disposition	96/97	97/98	98/99	99/00	00/01
Withdrawal of complaint	19.5%	17.05%	16.68%	10.3%	not available
Dismissal without investigation	10.5%	7.28%	5.62%	8.7%	19.3%
Dismissal following investigation	11.2%	23.31%	33.99%	41.5%	48.8%
Complaints settled	22.7%	14.05%	15.77%	15.4%	n.a.
Complaints referred to hearing	n.a.	19.8%	13.45%	15.1%	16.3%
Complaints not pursued	33.0%	18.82%	14.48%	9.0%	n.a.

¹⁷⁹

Statistics from Annual Reports of the B.C. Human Rights Commission from 1996/97 to 2000/2001.

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The statistics also reveal a decrease in the median processing time for complaints by the Compliance Program over the last four years:¹⁸⁰

	97/98	98/99	99/00	00/01
Intake (no. of days between filing of complaint and assignment for investigation)	26	18	22	32
Investigation (no. of days from assignment to an investigator to referral to CIM for decision)	625	193	259	258
Decision (no. of days for CIM or delegate to review file and make decision to dismiss or refer)	190	98	80	64

The majority of current complaints are processed in approximately ten months. In its strategic plan, the Commission has set the goal of a 12-week processing timeframe by the year 2002.

Compliance Program Initiatives

In 2000, the CIM initiated the Compliance Reform Project, which is the successor to the Alternative Dispute Resolution Project of the previous year. The Compliance Reform Project has three components: (a) complaints process streamlining; (b) dispute resolution; and (c) access to justice.

Complaints Process Streamlining

The CIM retained Brian A. Pollick, Themis Program Management and Consulting Ltd., a management expert, to review the HRC's case management system. Mr. Pollick produced a report entitled *Human Rights Commission – Investigation and Mediation, Case Management Review Report* (January 2001) (the Pollick Report) which critically examines the case management system and makes a number of recommendations to increase its efficiency.

Those recommendations included developing a conceptual case management system model, updating job descriptions, maintaining a master case list, developing and implementing a communications plan, quality assurance, staff recruitment and training, administrative paper flow and improving computer complaint-tracking capacity. The recommendations in the Pollick Report have not yet been implemented.

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Statistics from Annual Report of the B.C. Human Rights Commission for 2000/2001.

Dispute Resolution Pilot Project

In the spring of 1999 the HRC, in partnership with the Dispute Resolution Office of the Ministry of the Attorney General, jointly undertook the Dispute Resolution System Design Project. This project was aimed at improving the quality of and increasing the choices available for resolving disputes. The project adopted a "shared decision-making model" in which representative stakeholders were to work together to design a new dispute resolution by consensus. As described in a subsequent draft report:¹⁸¹

This phase of the project culminated in a meeting of potential design team members on June 23, 1999. The facilitated meeting, attended by stakeholders representing sectors and Commission, DRO and Ministry of Attorney General representatives, was not successful in advancing the design process. The stakeholders did not have a clear understanding of the project in which they were being asked to participate and did not come prepared to enter into a shared decision-making process.

In January 2000, a new CIM was appointed. Upon her arrival at the Commission, she put the DR Project on hold while she familiarized herself with the workings of the Commission and determined her priorities. After consultation with staff and stakeholders, the CIM ... proposed a different approach to the reform agenda of the Commission than that taken under the Dispute Resolution Design Project.

The Dispute Resolution System Design Project was subsequently recast and redefined as one component of the Compliance Reform Project and a "key result area" in the Compliance Program's Business Plan for 2000/01. The project envisaged pilot testing of proposed reforms. The design team conducted a detailed analysis of what other jurisdictions (including Australia, New Zealand, and some American jurisdictions) have done to deal with problems of backlog, delay, procedural complexity and general dissatisfaction with the complaints process.

A six-month early mediation pilot project was then launched by the Compliance Program in June 2001. The early mediation project is designed to resolve complaints through early mediation at the front end. Approximately 70 to 80% of the complaints filed with the HRC are referred to early mediation. The cases which are not referred to early mediation are screened out because they are either so weak that they are likely to be dismissed or so complex that early mediation is unlikely. The remainder of complaints is assigned to a group of four human rights officers who contact respondents before service of the complaint to discuss the potential for mediation.

One of the goals of early mediation is to canvass possible settlement before it is necessary for the respondent to invest any resources on the defence of the complaint and before material comes out through the course of investigation, which makes parties more positional.

Complainants are advised that they are entitled to legal aid representation for mediation where the respondents are represented by counsel. The human rights officer prepares the parties for mediation by explaining the process and facilitating settlement discussions during the meeting.

Apart from concerns that some respondents are attempting to use early mediation solely for the purpose of obtaining discovery, the early indications from the pilot project are promising. Although statistics are not currently available, HRC staff indicate that a large percentage of complaints are being resolved through early mediation.

Access to Justice

An Access to Justice Project was also initiated to increase and broaden access to the human rights system to address such issues as geographic location and non-physical barrier to accessing the system (i.e., language, culture, literacy) as well as examining regional service delivery models. The project is currently on hold due to lack of funding to conduct necessary research. The CIM will look at the possibility of funding this project during budget development discussions for 2001/02.

Related to this initiative is the work that has been done to assign human rights officers to various regions throughout the province to ensure regional access. All of the human rights officers in the Vancouver office service complaints in the Lower Mainland. The seven human rights officers in the Victoria office are responsible for different regions around the province. Two officers work on complaints for the Greater Victoria area, two officers work on complaints for the Northern and Interior part of the province, one officer works on complaints for Vancouver Island (excluding Victoria), one officer works on complaints for the Kootenay area, and one officer works on complaints for the Okanagan Valley.

HRC Initiatives

In March 2000, the HRC retained Verus Group to develop a strategic communications plan. The resulting plan, called *The Rights to Know*, is designed to both increase awareness of the Code and the HRC's work throughout the province and improve employee relations within the HRC.

As a result of community concerns that the HRC was dismissing a disproportionate number of race-based complaints the HRC established a Race Complaints Committee. This committee retained consultant Ana Mohammed (now a HRT member) to review the complaint files of thirty-five race and thirty-five sexual harassment cases in an attempt to ascertain whether there were

¹⁸¹ Prepared by Erin Shaw, Dispute Resolution Office, in February 2001.

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indicators in these files as to why the dismissal ratios were disproportionate. Ms. Mohammed's report, *The Investigation of Race Complaints at the B.C. Human Rights Commission*, was released in October 2000.

The HRC regularly participates at meetings with the EAC, which is composed of representatives of the business and employer community (e.g., the Chamber of Commerce, the Business Council of B.C., the GVRD, the Small Business Council, the Retail Business Council and the Board of Trade). The HRC has also established an ongoing relationship with the B.C. Federation of Labour.

The HRC has also commissioned a number of internal reports as part of an HRC project entitled *Developing Initiatives Related to Systemic Discrimination for the British Columbia Human Rights Commission* over the last four years. Those reports are:

- *Report on Framework and Development of Priorities for the Deputy Chief Commissioner*, by Gwen Brodsky and Shelagh Day, Brodsky & Associates (July 3, 1998)¹⁸²
- *Working with Community Organizations*, by Gwen Brodsky and Shelagh Day, Brodsky & Associates (July 3, 1998)¹⁸³
- *The Power to Conduct Hearings*, by Gwen Brodsky and Shelagh Day, Brodsky & Associates (July 16, 1998)¹⁸⁴

In October 1999 the HRC retained Verus Group and CV Marketing Research to conduct a 603-sample telephone survey of randomly selected B.C. residents for purposes of measuring the public's general human rights awareness. The survey measured various levels of tolerance, attitudes towards discrimination, knowledge of the complaints process, incidence of discrimination, awareness of the Code and the HRC. The results highlighted for the HRC the

¹⁸² This report deals with (1) analytical developments and defining systemic discrimination, (2) the Code, systemic discrimination and the mandate of the DCC (legislative overview); (3) functional requirements of the DCC and procedural fairness issues; and (4) building good jurisprudence to make human rights meaningful for disadvantaged groups.

¹⁸³ In this internal report, the authors document the results of preliminary discussions with some community groups directed at ascertaining (1) how the DCC's powers could be used to assist communities and (2) human rights issues of priority.

¹⁸⁴ This paper explores the power of the CC and the DCC to conduct hearings under section 6 of the Code. More particularly it "examines the Commission's new power to conduct hearings and the change this represents in the conception of the Commission's roles. The second discusses Canada's history with public inquiries, and the difference in character and modes of operation between "policy" and "investigative" inquiries. The third section delineates the lessons that can be learned from government-appointed public inquiries about managing the process of an inquiry. The final section described the inquiries undertaken in Australia and Quebec, considering the different models used for the inquiry process and the types of issues addressed.

regional differences in awareness and understanding of the both the Code and the role and functions of the HRC. It assisted the HRC in the development of specific education, communication and community outreach strategies.

The DCC has achieved success in supporting complaints of systemic discrimination particularly in the context of settlements. The DCC recognizes that the shift in focus to systemic complaints prolongs the length and cost of investigations and hearings in the short term; however, pursuing these complaints should result in increased efficiencies in the long run by reducing the overall number of repetitious complaints.

HRT Initiatives

The HRT has adopted a number of measures to improve efficiencies, provide better access and decrease the delay for the adjudication of complaints referred to hearing since 1999. The HRT has implemented and refined a case management process which focuses on the flexible management of complaints having regarding to the complexity of the issues.¹⁸⁵ It has instituted the practice of conducting pre-hearing conferences as a case management tool to address issues that would otherwise consume time at hearings or result in adjournments of hearings.

The HRT uses settlement conferences and mediation as important case management tools and, to that end, has developed a mediation policy. The HRT provides in-house mediation services and also contracts with mediators to provide these services. HRT staff and members have also participated in mediation training programs.

The HRT has made recommendations on the need for legislative amendment to enhance the just and timely resolution of complaints, including recommendations respecting the need for the power to make rules and to require parties to disclose relevant documents in advance of the hearing. It has adopted Rules of Practice and Procedure that provide for a process for addressing discovery, disclosure and other pre-hearing matters. The rules were enacted November 1, 1999, following public consultation. In February/March 2001, the HRT solicited input from parties appearing before it, and the broader human rights, employment, labour and administrative law community, on how these rules could be improved to facilitate the just and timely resolution of the complaints that are referred to hearing. As a result of these submissions, the HRT amended its rules effective November 1, 2001. The amendments are designed to

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Due to budget constraints, however, the HRT's case management system is not as sophisticated as it could be. For example, the types of statistics referred to in this Report relating to the HRT had to be generated manually. The HRT's complaint tracking system can indicate when complaints were referred, how many complaints are currently opened, and similar tracking information.

improve efficiencies and effectiveness of the hearing process, including timeliness for the disclosure of documents.¹⁸⁶

The HRT established the position of Member/Registrar who ensures consistency, efficiency and appropriate streaming of cases during the pre-hearing process. The Member/Registrar conducts pre-hearing conferences, determines pre-hearing applications and takes steps to ensure that the parties are prepared to proceed on the scheduled hearing dates. The Member/Registrar also ensures that self-represented parties understand the hearing process.

The HRT has also taken steps to ensure that the parties and general public receive information about the HRT process, policies and decisions. The HRT's website provides access to the Code, the Rules of Practice and Procedure, a Hearing Backgrounder, the Mediation Policy, HRT decisions and indices of those decisions. The HRT also has a computer available for public use in the lobby of its offices.

The HRT has developed training for staff and members to promote excellence in customer service. It has developed performance measures for members that are reviewed on an ongoing basis. These measures relate to the courteous and respectful treatment of the client group, timeliness in dealing with the referral of complaints, timeliness in the hearing and decision process, well-reasoned decisions consistent with evidence and the law, the application of alternative dispute resolution mechanisms and accessibility of the HRT's decisions.

The HRT increased its in-house legal services (to 1.2 FTEs) in order to reduce the need for outside legal assistance and engaged in a national recruitment effort to select the current chair.

CHAPTER X: OPTIONS FOR STRUCTURAL CHANGE

It is evident to many individuals and groups who work in, or deal with, the human rights system in this province that there are structural difficulties with the current scheme. The Human Rights Review is designed to "rethink" fundamental assumptions about the statutory mandates, responsibilities, programs and services carried out by the HRC and the HRT. The ultimate objective of this process, of which this is only the first phase, is to ensure that the most appropriate, accessible, efficient and fair structural and service delivery models are being used

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From the point of view of the HRT, the 1999 Code amendments enabling the HRT to establish procedural rules has resulted in enormous efficiencies and increased consistency in its pre-hearing and hearing process.

and to ensure that the human rights process continues to address equity and social justice concerns.

Before undertaking an examination of the strengths and weaknesses of the current system and the range of alternative structural models to address problems which have been identified with the Code, it is first necessary to review the goals of human rights legislation and to examine the standards on which an administrative justice system for human rights should be measured.

Goals of Human Rights Legislation

There have been major developments in the concepts of discrimination and equality in the last twenty years. Despite the evolving nature of these concepts, and the expanding scope of protection, the overarching goal of human rights legislation has remained unchanged. That goal is to prevent the spread of prejudice and discrimination where it occurs and to foster tolerance and equality in our society. In every Canadian jurisdiction, this goal is achieved by: (a) addressing discrimination at the individual and systemic levels; (b) providing a means of redress to individuals and groups who have suffered individual and/or systemic discrimination; and (c) addressing discrimination through research, information and education. These are the fundamental purposes set out in s. 3 of the current Code.

Characteristics of an Efficient Administrative Justice System

As the instrument through which we meet our international human rights obligations, our regime for the protection and promotion of human rights should reflect the key criteria of the Paris Principles: independence and autonomy in decision-making, adequate powers of investigation and sufficient resources to carry out the statutory mandate.

The process established by the Code to administer and enforce human rights should also have the attributes of a sound administrative justice system. While the classic hallmarks are accessibility, efficiency and fairness, we believe that an administrative justice system in the area of human rights should meet all of the following principles:

- it should be *fair* and seen to be so
 - ◆ by ensuring equality of access
 - ◆ by ensuring a full opportunity to participate
 - ◆ by ensuring consistency of treatment

- it should make *efficient* use of resources
- its procedures and costs should be *proportionate* to the nature of the issues involved
- it should be *just* in the results which it delivers
- it should process complaints with reasonable *speed*
- it should provide as much *certainty* as the nature of each case allows
- its process should be *understandable* to those who use it
- its process should be *responsive* to the needs of those who use it
- its process should be *effective* in terms of being adequately resourced and organized to meet these principles¹⁸⁷

To this list we would add that the system should contain mechanisms (perhaps including legislative ones) to ensure that those responsible for its administration are accountable for the success of its operation.¹⁸⁸

An Examination of the Current System

It is important to emphasize that the structure established by the Code has been effective on a number of fronts. The bifurcation of responsibilities between the HRC and the HRT has resolved the conflict that existed when the former Human Rights Council both processed and adjudicated human rights complaints. The Code has elevated the importance of the educational mandate by conferring specific responsibilities on the CC and DCC to carry out work in this area. The Code has also focused attention on the importance of addressing broader systemic discrimination.

¹⁸⁷ Many of these principles derive from the principles set out in Lord Woolf's Interim Report on *Access to Justice* with respect to the civil justice system in England and Wales.

¹⁸⁸ The Canadian Bar Association outlined the following considerations which should be involved in crafting the right process for human rights in its submission on *Canadian Human Rights Act Review* dated December 1999 which was submitted to the La Forest Panel: claimants should have the right to have their complaints heard by a quasi-judicial or judicial adjudicator; respondents should have the right to expect a system which is procedurally fair, takes their legitimate interests adequately into account and provides a disincentive for claimants to pursue frivolous claims; the complaint process should not take too long or be too expensive, should not be overly technical or adversarial and should emphasize early resolution or settlement of complaints; the investigation process needs to be transparent; the public interest needs to be represented in the resolution of complaints; those who adjudicate human rights disputes should generally have expertise in human rights, administrative law and *Charter* issues; the Commission has finite resources and as a result: (1) is not able to represent all complainants, regardless of the chance of success of their complaints, before a quasi judicial body and (2) should be able to direct its resources to complaints where the public interest is significant.

The DCC has participated extensively in complaints that fall within the criteria of the HRC Public Interest Policy. The DCC has been instrumental in achieving systemic changes in a number of cases including some which have been settled prior to hearing. The Code confers authority on the HRT to establish rules of procedure. The HRT has instituted comprehensive rules for facilitating the just and timely disposition of complaints referred to hearing.

On an administrative level, the CIM has worked through a considerable backlog of complaints and has steadily decreased the timeframe for the processing of complaints. The CIM has been effective in screening out a significant portion of complaints without referral to hearing. Compliance staff are sensitive to the issue of regional access and are attempting to address it within available resources. The CIM's innovative early mediation pilot project is also yielding promising results. The objective of canvassing settlement before the parties invest time and resources into the complaint and before resources are expended on investigation is a laudable goal. The HRT has also achieved success in using mediation as a case management tool.

However, there continue to be concerns with the current system, particularly when measured against the principles that ought to shape an administrative justice system.

With respect to the importance of fairness (and the appearance of fairness), it was beyond the scope of our mandate to analyze investigation files on a case specific basis to determine whether substantive decisions made in the complaint processing system were fair. We were in a position, however, to consider the issue at an institutional level. There is no question that the process is procedurally fair in the sense that all parties to a complaint receive information and are provided with an opportunity to be heard before the complaint is remitted for disposition. The critical point though is that it is not sufficient to have textbook fairness – the system must also be “seen” to be fair by those who use it and the public at large.

The feedback we received indicates that the complaint processing system, from intake through investigation to the referral stage, is not perceived to be fair by parties and those involved in representing them in complaints. Complainants regard the CIM screening process as overzealous and one that undermines access to the HRT. The complainant community believes that HRC staff makes inconsistent decisions which lead to uneven treatment at all stages of the complaint process.¹⁸⁹ Business and employer respondents believe that the HRC and its staff have an institutional bias in favour of complainants that is reflected throughout the complaint processing system.

¹⁸⁹ The Coalition for Human Rights warns their clients that they face “the luck of the draw” when it comes to who may be assigned to deal with their complaint.

The delegation of screening decisions from a commissioner who is an order-in-council appointment independent of government to managerial staff in the Compliance Program has also served to undermine the perception of fairness because of the absence of institutional procedural safeguards to insulate managers engaged in making dismissal or referral decisions from immersion in and supervision of other staff complaint processing functions. This observation is in no way intended to denigrate the efforts of the hard-working and dedicated staff who work in the Compliance Program but, given the sentiments expressed by complainant and respondent groups alike, it must be acknowledged that the manner in which the system has been operated has not engendered users' confidence or trust that it is a fair process.

These perceptions are, to some extent, a consequence of the adversarial environment in which the Compliance Program has operated. Although human rights schemes are intended to be more conciliatory than other types of administrative justice systems, the reality is that parties are often polarized. One side will inevitably be critical when a complaint is dismissed or referred to hearing. As Howe and Johnson point out in *Restraining Equality*, human rights commissions (and we would add their staff) face "a devilish task".

These perceptions are also the inevitable result of the inclusion, under the umbrella of one commission, of the CIM (who operates in a neutral manner) and the DCC (who operates in an adversarial, non-neutral manner). Where the parties perceive imbalances or biases in the CIM or HRC overall, it is of little comfort that, as a matter of law, the legislative institutional scheme is defensible under natural justice principles. The reality is that the complaint processing system does not command the level of public confidence and respect that it should have in order to function successfully as a system for the protection and promotion human rights.

With respect to the importance of efficiency in the use of resources, the investigation function does not appear to be an efficient use of the HRC's resources for many complainants. The HRC spends approximately \$2.05 million annually on the Compliance Program.¹⁹⁰ Many believe that this use of resources is unwarranted because the investigation process does not add significant value to the resolution of most complaints. In a jurisdiction where a commission has carriage of the complaint, evidence gathered in the investigation will be useful to commission counsel when the complaint reaches the hearing stage. In this jurisdiction, where complainants have conduct of their own complaints, the results of the investigation do not appear to provide much assistance for the hearing. This is so, in part, because the investigator's narration of the facts and issues surrounding a case has no evidentiary value and in most instances cannot be fairly tendered at

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Exclusive of overhead costs for offices, etc.

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the hearing stage except by agreement of all parties. A further limitation is that investigations and investigation reports in this jurisdiction typically do not involve the gathering or attaching of witness statements, or at least not in a form that is useful to the parties' tasks of establishing their cases at the hearing level. Hence, the investigation report is not used at the hearing stage at all. Additionally, there can be no doubt that limiting the investigation function to a smaller number of complaints would significantly speed up the processing of complaints overall.

Although the investigation function is not the most efficient use of resources for most complaints, some complaints should be investigated. For example, in order to be effective in advancing systemic complaints, the DCC must have powers to conduct investigations because allegations of systemic discrimination can generally only be established through the exhaustive and skilled review of the policies and records of the respondent institution.

The commitment of resources by the DCC for participation in hearings is of questionable value in cases where systemic issues are taken forward to the HRT by the complainant. In such cases, there are effectively two legal counsel paid out of the HRC budget who participate in the hearing to support the complaint. While there can be tactical advantages with a division of labour, it must be questioned whether this is necessary in a period of limited resources. CAHRTS was critical of the DCC's use of resources in situations where the complainant has adequate representation and there is no conflict between their respective interests. It may make more sense, in terms of the efficient allocation of resources, to confer responsibility on one body (e.g., the HRC) to assume carriage of complaints that raise systemic issues of public concern to obviate the need for separate legal aid funding for the complainant.

It might also be more efficient than the existing system in this province to transfer responsibility to the HRC for carriage of all individual and systemic complaints referred to hearing. This is the conventional model used in most jurisdictions in Canada. At present, the DCC participates as a party but can be excluded from settlement discussions. Although the Code confers full party status on the DCC, parties often view the DCC as little more than an intervener in the complaint process. Institutional respondents facing systemic complaints sometimes settle the case with the individual complainant. Since the DCC has no jurisdiction to carry on with the systemic aspects of the complaint once it is withdrawn or settled, the underlying purpose for DCC participation is effectively frustrated.

Funding legal aid counsel for all complainants and eligible respondents imposes an increasingly difficult financial strain on the HRC's budget. The HRC allocates \$300,000 per year to legal aid funding. Last year, the HRC spent approximately \$465,000 for legal aid, leaving an overrun of

\$165,000, which must be absorbed in the current year's budget. To compound the problem, legal aid costs appear to be increasing. The HRC anticipates that the total cost for legal aid for the current year will be in the range of \$500,000. It now faces the difficult task of finding ways to cut back on legal aid services to contain costs, without exercising any real control over the demand for legal aid services to complainants and eligible respondents.

The HRC would have significantly more control from a budgetary perspective if it had a broad discretion to determine which complaints to carry forward to hearing and used in-house or *ad hoc* counsel to assume the carriage of selected complaints. This would facilitate the targeting of resources to complaints that raise broad systemic issues. The remainder of complainants would face the prospect of pursuing complaints without the assistance of funded counsel. This raises a policy question of whether it is important to provide legal representation resources for all complaints or whether those resources should be selectively targeted to complaints that will advance human rights in a broader way.

The principle of efficiency relates closely to the principle of proportionality between procedures and costs and the nature of the issues involved. Under the current system (with the exception of complaints resolved under the early mediation pilot project), complaints are processed in the same way regardless of their nature or complexity.¹⁹¹ Although s. 26 of the Code contemplates that a complaint may be disposed of without an investigation, the CIM will dismiss without an investigation but, as a matter of policy, does not make referral decisions without an investigation because of perceived procedural fairness concerns. As a consequence, investigations prior to referral to hearing are simply regarded as mandatory. Yet in some cases, the investigation and report derived from it are no more than a time-consuming correspondence treadmill. This state of affairs is precisely what provoked profound criticism from the Supreme Court of Canada in the *Blencoe* case.

The utility of HRC investigations for many types of complaints is not clear. Cases that turn on issues of credibility are frequently neither advanced, nor amenable to resolution, by investigation and therefore must be referred to hearing regardless of the investigation outcome. Cases that raise fundamental questions of law (e.g., the *CJC* and *Abrams* complaints in which the respondent acknowledged writing the newspaper columns but challenged the constitutionality of s. 7(1)(b) of the Code) must also generally be referred to hearing. Cases that turn on questions of jurisdiction should bypass the HRC investigation stage too. These are just some examples of

¹⁹¹ In the early mediation pilot project, a preliminary assessment is done to screen out those cases that are so weak that they are likely to be dismissed or so complex that early mediation is unlikely. The

cases where the principles of efficiency and proportionality could be best served by fast-tracking without an HRC investigation.

Practitioners who represent respondents contend that it is not a proportionate response to refer a complaint to hearing where the complainant has refused a reasonable settlement offer at the intake stage. They point out that the system does not provide true settlement incentives for complainants who do not face cost consequences for failing to accept a reasonable settlement offer at the early stage of a complaint. We understand that in such circumstances the CIM does in fact have a policy of dismissing the complaint on the basis that proceeding with it would not further the purposes of the Code (s. 27(1)(d)(ii)). This is, however, a dubious source of authority for dismissal of a complaint where the complainant has refused to accept a reasonable settlement offer. This lack of clear authority under the Code is to be contrasted with other jurisdictions such as Alberta and Manitoba that do confer express authority on the commission to dismiss a complaint in such circumstances. The legislation in Alberta also affords complainants a right of appeal to the Chief Commissioner on the question of what constitutes a "fair and reasonable" settlement offer.¹⁹² In Ontario, the commission will withdraw its participation where a complainant refuses to accept a reasonable settlement offer, leaving the complainant free to pursue his or her own complaint.

There is no clear authority to award costs as an incentive to settlement under s. 37(4) of the Code. The HRT may only award costs where, in its opinion, the party has engaged in "improper conduct" during the course of the investigation or the hearing of the complaint. Again this is to be contrasted with other jurisdictions which confer a broader discretion on the tribunal or board of inquiry to award costs against parties to a complaint (Ontario *Human Rights Act*, s. 41(4), Alberta *Human Rights, Citizenship and Multiculturalism Act*, s. 28(2), Manitoba *Human Rights Code*, s. 45(2), Quebec *Charter of Human Rights and Freedoms*, s. 126, Prince Edward Island *Human Rights Act*, s. 28.4(6), and Newfoundland *Human Rights Code*, s. 28(2)).

The principles of a sound administrative justice system also require a process that is understandable and responsive to those who use it. While the HRC provides considerable assistance to members of the public concerning the human rights process and has published a comprehensive set of policies and procedures governing the exercise of their powers,¹⁹³

remainder of cases are directed through this process before investigation. A similar vetting process could be undertaken to determine whether investigation is necessary for each complaint.

¹⁹² *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, ss. 20(1)(b) and 22(1) and (3) and *Human Rights Code*, S.M. 1987-88, c. 45, s. 29(2)(b).

¹⁹³ One practitioner referred to an instance where the human rights officer refused to provide access to the Policies and Procedures Manual despite the fact that it is a public document.

members of the respondent community believe that the referral process is not well understood nor well communicated to stakeholders in the community. The CIM has a statutory obligation to provide reasons for dismissal of a complaint, but the Code does not impose a corresponding duty to provide reasons for referral. This is a source of concern to the respondent's community.

The individuals and organizations that we spoke to expressed concern that the HRC is not responsive to the needs of parties or indeed the public at large. CAHRTS considers that "the structure of the complaint investigation progress is rigid and lacking in the flexibility needed to provide prompt, fair and effective service to complainants and respondents. Some observed that the HRC has done a poor job of fulfilling its mandate to carry out public education. Although the ability to undertake education is largely a function of available resources, there is a concern that educational goals become subordinate to administrative responsibilities with respect to complaints and participation in the hearing process. The HRC believes that it has made significant progress in its public education mandate.

Practitioners who represent employer and business groups believe that the HRC has not been responsive in terms of meaningful consultation nor in terms of providing guidance on employment issues to mid and large size institutional employers. The function of providing assistance and guidance to business and employer groups falls squarely within the CC's mandate to promote an understanding of the Code. Providing guidance is an important preventative measure that would assist these groups to formulate policies which are consistent with the requirements of the Code with a view to reducing the number of future complaints. The Ontario Human Rights Commission has achieved considerable success by partnering with various business, employer and other groups such as the Human Resource Professionals Association of Ontario on workshops and campaigns.

A related concern is the inability of the HRC to provide a guarantee to respondents who institute systemic changes, in the context of settlement discussions, that those changes will not form the basis for future complaints. This operates as a disincentive to respondents to institute systemic changes at the settlement stage. In Manitoba, s. 21(1) of the *Human Rights Code* provides a procedure for obtaining an advisory opinion from the commission to determine whether certain acts or omissions contravene the Code. Where an advisory opinion indicates that the act or omission does not contravene the Code, the person is conclusively deemed not be in contravention of the Code in undertaking that act or omission. Similar provisions in this jurisdiction would provide some assistance to employers and business groups in attempting to formulate policies that are consistent with the Code.

The principles of administrative justice require that an administrative body deal with complaints with reasonable speed. Since we have devoted a chapter to the question of delay, it need only be acknowledged at this stage that fairness requirements take time. Compliance staff diligently discharge the duty of fairness by ensuring parties have a proper opportunity to be heard; indeed, so much so that some practitioners were critical of the "submission volleyball" which often takes place because parties continue to file reply submissions. The average complaint takes approximately ten months to process before dismissal or referral to hearing. This processing time could be shortened significantly for complaints that are fast-tracked to the HRT for hearing without investigation.

Effectiveness in terms of adequate resources and organization is a further characteristic of a sound administrative justice system. Is the HRC effective in terms of being adequately resourced and organized to meet its objectives? There is concern that the HRC is not adequately resourced to carry out the full scope of its mandate, particularly with respect to education, research and public consultation. There is a more fundamental concern, however, that placing three commissioners, each with a different mandate, under the umbrella of one organization leads to confusion and a lack of vision and clear leadership for carrying out the purposes of the Code. It is likely that there will continue to be confusion and a perception of bias as long as the CIM and DCC perform their respective functions within one organization.

With these considerations in mind, we turn to a discussion about some types of alternative models for structural change.

Alternative Structural Models

Below we discuss selected alternative models for the delivery of complaint process and adjudication services under human rights legislation. In doing so, we have not aspired to be either exhaustive or definitive, but rather to explore a range of conventional and more novel models that might potentially serve the purposes of the Code, offer the characteristics of an effective administrative justice system, address deficiencies and build on attributes of the existing system, and fulfill Administrative Justice Project and Core Services Review priorities such as relevancy and affordability. We must also emphasize that we have been asked only to outline possible options in very general terms, and not to make recommendations concerning them.¹⁹⁴

¹⁹⁴

See also, Shelagh Day and Gwen Brodsky, *Improving Canada's Human Rights Machinery, A Report Prepared for Canadian Human Rights Act Review Panel* (October 1999), where the authors detail a number of different possible structural models.

The alternative structural models suggested below focus upon a justice system for complaint processing and adjudication. For the most part, they do not incorporate consideration of functions that are not complaint-based; for example, research and education in relation to human rights, the roles of an advisory body such as the existing HRAC, exemptions for affirmative action or like programs or binding policy and rule-making concerning the requirements of human rights legislation (a function provided for in some other jurisdictions). Also, there may well be other models, or variations on the listed models, that warrant serious consideration in Phase 2 of the Project.

Model 1 - "Traditional" Commission Structure With Efficiency Modifications

This model would be a return to the most common existing structure in Canada (similar to what existed in this province prior to 1984): a human rights commission which would have carriage of all complaints and be responsible for intake, investigation, mediation, summary dismissal or referral to hearing, and advocacy of complaints before a separate hearing tribunal, as well as for education and research functions relating to human rights. Under this model, the time frame for filing complaints would be shortened, with the discretion in the HRC to relieve against time limitations only in extraordinary circumstances.

Incompatibility of the varying HRC functions calling for orientations of neutrality, advocacy and oversight would be accommodated by express statutory authority and separation of functions within the HRC. The HRC would have a broad discretion about whether or the degree to which it investigated complaints. Direct referral to HRT hearing would be added to the summary dispositions available to the HRC. The HRC would also be given express power to dismiss a complaint if the complainant unreasonably declined a settlement offer or had, prior to filing the complaint, entered into a settlement agreement in relation to substantially the same issue or issues.

There would be more statutory and administrative emphasis on mediation and speedy process (i.e., statutory time limits for process stages and disclosure as well as variable administrative tracks for different kinds of complaints). Dismissal/referral decisions would only be made by other than the CIM in exceptional cases in order to ensure appropriate independence and consistency in decision-making. Dismissal decisions would be subject to reconsideration by the HRT with power in the HRT to substitute its decision for that of the CIM in appropriate cases. Alternatively, claimants would have the right to pursue their claims independently where the HRC declined to assume carriage of their complaint.

The HRT would continue to operate in a court-like adjudicative style, with the addition of broader pre-hearing case management and alternative dispute resolution mechanisms. For example, the HRT would be given a statutory authority to dismiss complaints without a hearing in appropriate circumstances. Early mediation would be available and encouraged. The HRT would also be given broader powers to impose costs as well as express power to dismiss a complaint on the basis that a complainant has unreasonably refused an offer of settlement.

The Code would require HRT members to have certain minimum qualifications. For example, the statute could require members to be lawyers in good standing with a provincial bar for at least ten years with demonstrated expertise, experience and interest in human rights.

There would be provision for a statutory right of appeal from HRT provisions to the Court of Appeal and statutory clarification of the standard of review to be applied by that Court. This latter feature would enhance certainty and finality concerns associated with HRT decisions. The former would overcome concerns regarding the lack of any limitation period for commencing judicial review proceedings.

Model 2 – Existing British Columbia Structure With Efficiency Modifications

This model would continue the current HRC/HRT structure, but the HRC's functions would be significantly redefined so that:

- the HRC would continue to be the primary contact for all complaint inquiries and filing;
- HRC investigations prior to referral to hearing would be the exception, rather than the rule as they are at present;
- the HRC would continue to screen complaints through assistance and information alone (i.e., without investigation) but only to ensure that they fall within the statutory time limits for filing complaints and the scope of the legislation and to ensure that they are not trivial, frivolous, vexatious or contrary to Code purposes;
- the HRC's existing summary dismissal functions would be largely replaced by active and mandatory HRT case management, settlement conference and other pre-hearing procedures.

HRC investigations would be principally reserved for systemic complaints taken on by the HRC directly. For other complaints, information, assistance and intake would stay with the HRC, but the investigation function would be supplanted by HRT supervised discovery procedures. Once the HRC accepts a complaint for filing, there would be early personal contact with the respondent

and early mediation would be encouraged and made available in appropriate cases. HRC investigations would be principally reserved for those systemic complaints to which it either chose to become a party or filed directly. For other complaints, information, assistance and intake would stay with the HRC, but the investigation function would be supplanted by HRT supervised discovery procedures. The goal would be to address delay and process complexities at the HRC level by encouraging early mediation and resolution, substantially reducing the HRC's investigation function and eliminating its dismissal jurisdiction. This would, in turn, eliminate the most important source of incompatibility between the CIM and DCC roles, allowing for the CC, CIM and DCC divisions to be re-merged into a scaled down, more cohesive, efficient and unified HRC.

With the exception of HRC carried systemic complaints, funded advocacy for complainants and respondents would continue with the present legal aid model (i.e., all complainants would be eligible for legal aid as would those respondents who qualify under the means test). The HRT would have the power to require the HRC to participate as a party to an individual complaint; for example, the HRT could require the HRC to appear to address an important or complex question human rights law. Additionally, or alternatively, the HRC would have the discretion to intervene in "test" cases raising important or novel human rights issues.

More flexibility would be given to the HRT to dismiss complaints in circumstances where considerations akin to those reflected in the doctrines of abuse of process and *res judicata* arise or where complainants refuse reasonable settlement offers. The HRT's powers would be expanded to give it jurisdiction to dismiss complaints based on statutory criteria similar to that contained in sections 25 and 27 of the Code.

Efficiency features similar to those identified under Model 1 would be present in Model 2. For example, the time frame for filing complaints would be shortened with discretion to relieve against time limitations in expressly stated and limited circumstances. HRT members would be required under statute to have minimum qualifications, including legal training. The remedial powers of the HRT would be expanded to include a broader ability to award costs in appropriate circumstances. With the exception of decisions to dismiss a complaint without adjudication, decisions of the HRT would be subject to a statutory right of appeal (with or without leave) to the Court of Appeal, rather than judicial review in the Supreme Court. The standard of review to be applied on appeal (or judicial review in the case of dismissals without adjudication) would be clearly spelled out in the statute.

Like many of the proposed models, this model would require a reallocation of resources between the HRC and the HRT in recognition of the significant reduction of the HRC's investigation function and dismissal jurisdiction. Given that, statistically, only a very small percentage of complaints that are filed with the HRC are presently referred to the HRT for adjudication, the resulting increase in HRT workload would be significant. Appointments, staff and resources commensurate with such a shift in responsibility would be imperative.

Model 3 – Direct Access (Advocacy Oriented HRC/Judicial-style HRT)

This model would be based on the recommended model for the federal system detailed in the La Forest Report. Under this model:

Claims would be filed directly with the Tribunal. This process would have a pre-hearing process to ensure that cases without merit would not proceed to a full hearing before the Tribunal. The Tribunal would ensure through its rules and orders that the parties to the case were fully informed of the issues and the evidence of the other side before proceeding to a full hearing. Legal assistance would be provided to ensure that claimants and impecunious respondents had the help needed to present their case.

Model 3 would eliminate the CIM's main functions of universal screening, investigation, mediation, dismissal and referral to hearing. There would be little justification for retaining the CC, CIM and DCC divisions. The main reasons the La Forest Panel favoured this type of model over others are summarized below, in terms referable to the existing system in this province:

- the HRC would be relieved of institutional conflicts between its roles as advocate and decision-maker;
- delay at the HRC level would be eliminated;
- parties would be accountable for their own delays and the HRT would be given more powerful procedural tools to ensure the parties proceed quickly;
- the HRC would have greater control over its resources and ability to effectively use them;
- complainants would have greater control over their cases.

Under this model, the HRC would target its resources and participation to cases raising either broad systemic discrimination issues or novel or important questions of human rights law. The HRC would continue to have the ability to initiate complaints or join as a party to individual complaints. Where the HRC chose to become a party to an individual complaint, it would assume

carriage of that complaint for the complainant. The HRT would have the same types of efficiency and other features described under Models 1 and 2.

Model 4 – Direct Access (Advocacy Oriented HRC/ Inquisitorial and Active HRT)

This model would be a variation on Model 3, with the emphasis on transforming the HRT from a forum that has become significantly oriented to more traditional, passive style judicial decision-making in an adversarial setting, into a forum oriented to more inquisitorial decision-making, characterized by highly active oversight and intervention aimed at speedier and more efficient resolution of cases. The goal would be to combine:

- traditional qualities of judicial decision-making (respect for basic procedural fairness; authority; and coercive powers to back up that authority);
- the flexibility of administrative justice traditions; and,
- the progressive orientation of active case management by expert decision-makers who are accountable for the efficient processing, hearing and disposition of their case loads.

This model requires a different conception of the appropriate role of the HRT; one where it is accepted that the HRT's proper role is to be actively and continuously engaged in managing a complaint throughout the HRT process. At present, the case management function is carried out principally by the HRT Registrar. Under Model 4, and with some limited exceptions, each HRT member would be responsible for managing complaints from the point of referral through to the point of settlement or adjudication. Giving the HRT a more active and inquisitorial role in the processing and adjudication of human rights complaints would alleviate concerns about inadequate legal representation of parties, at least in cases that do not raise complex legal or factual issues.

The goal under Model 4 would be to avoid simply pushing systemic delays in the processing of human rights complaints upstream, and leaving the HRT as a judicial-style tribunal burdened with the same process delay problems that have plagued the adversarial system in our civil courts. Instead, the HRT would be given the statutory tools, and the responsibility, to actively and creatively manage both gate-keeping and discovery functions (effectively shifted from the HRC level to the HRT level) as well as its adjudicative function. Consistent with this type of active case management, there would be mandatory settlement conferences akin to those presently available in small claims court. The purpose of such settlement conferences would be to provide the parties with a frank and realistic assessment of the merits of the respective positions of the parties.

These settlement conferences would be conducted by a different HRT member and would reflect a more active, even aggressive, style of facilitating an early settlement.

Model 5 – Direct Access (HRT Only)

This model, a further variation on Model 3, was put forward by the CAHRTS group. In Model 3, the HRC's universal screening, investigation, dismissal and referral functions would be eliminated, but it would continue to provide information and assistance to complainants as well as investigate and have carriage of systemic complaints. The HRC would also have the ability to take forward its own complaints or assume conduct of or intervene in selected individual complaints. In Model 5, the HRC would be eliminated in favour of two independent, publicly-funded bodies: a human rights clinic advocacy service and a centre for human rights education, research and promotion. CAHRTS described the clinic and the centre in the following terms:

The Tribunal's work would be supplemented by a well funded independent, stand-alone human rights clinic to provide complete human rights advocacy service to assist in advice, representation and access to the Tribunal. The clinic's services would be free. The special nature of human rights and the lack of resources of most complainants make a human rights clinic imperative.

To offer a fair, effective and efficient alternative to the current model, the human right's clinic's operation would be supported by long term funding and its independence maintained by a board of directors. Its services would be available to both qualifying complainants and respondents. The clinic would advise applicants about the merits of a potential complaint and provide assistance in representation and access to the Tribunal. The screening work of the clinic will help reduce the number of complaints that the Tribunal is asked to deal with.

The clinic would serve its clients through a blend of staff including paralegals, staff lawyers and legal aid tariff lawyers. It would provide service outside the lower mainland by utilizing and assisting existing community law offices which are part of the Legal Service Society (legal aid) system.

...

We recommend that establishment of a "Centre for Excellence in Human Rights". The Centre would have a clear mandate of human rights education, research and promotion and would be an independent by publicly funded agency governed by a board of directors. Its mandate would be threefold:

- 1. Prevention of human rights violations through education and awareness, ensuring the public understands current human rights principles;*
- 2. Research and creation of a body of knowledge and precedent for use by anyone interested in human rights in general or with a particular issue or problem. In this regard this Centre would maintain links with academic institutions and non-governmental organizations;*

3. *The research functions would include a mandate to monitor progress of substantive equality for all British Columbians and review the effectiveness of human rights delivery mechanisms and make recommendations for change where needed.*

The following premises appear to underlie the CAHRTS model and would require further study and justification:

- human rights advocacy and education functions should be publicly funded;
- human rights advocacy and education functions should operate independent of government;
- human rights advocacy and education functions should focus principally on complainant, not respondent, interests;
- publicly-funded human rights advocacy and education functions that operate independent of government can satisfy objectives of efficiency, effectiveness and accountability.

Model 6 - Direct Access (HRC/Court)

This model would eliminate the HRT and put the adjudication function in human rights legislation into the hands of the provincial court system, the supreme court system or a combination of the two.

For example, in a manner not entirely unlike the processes under the *Small Claims Act and Rules*, individuals would file human rights complaints directly with the Provincial Court with limited assistance from registry staff. The HRC would continue to exist but without its intake and screening functions. It would have the ability to file complaints of a systemic nature or participate in individual complaints and, once involved, to investigate complaints. Discovery (apart from the HRC's investigation functions in relation to the complaints it brings) and mandatory settlement conferences, would be overseen by court processes. Legal representation would be provided through a legal aid model operating through community clinics and lawyers in private practice.

Judges would be drawn from the existing Provincial Court or appointed as exclusive Human Rights Judges to a Human Rights Court. If judges were drawn from the existing Provincial Court, they would be legal generalists and the long-standing objective of using decision-makers with special expertise in human rights would be compromised. Because of the prominent criminal justice component of the Provincial Court, its "regular" judges might also tend to have a criminal law orientation that would be inappropriate to the adjudication of human rights matters. The traditional objective of using specialists to decide human rights complaints might be met by

appointing exclusive Human Rights Judges. With such specialized appointments, other distinctions between using an administrative versus a court judicial system for first instance human rights decisions would then come to the fore.

Consideration might also be given to the bifurcation of direct access complaint adjudication streams into a small claims type of Provincial Court forum for individual complaints and a trial type of Supreme Court forum for systemic complaints. The Supreme Court is the principal venue of first instance for equality claims under the *Charter* and, although the tests are not the same, the jurisprudence in such cases is similar to human rights jurisprudence. Familiarity and expertise with *Charter* equality litigation would have value in the adjudication of both individual and systemic human rights complaints. However, most individual complaints would not require or benefit from the formality or expense of a Supreme Court forum. Direct access adjudicative streams that were bifurcated between an HRT or Provincial Court level and a Supreme Court level could allow systemic cases, which by their nature tend to be more complex and consequential than individual cases, to go directly to a superior court.

Yet a further, and more targeted, judicial forum variation might be to provide for a direct stream to the Supreme Court for stated cases on a point of law or, with leave of the court, for systemic cases. The objective would be to facilitate and expedite the movement into the senior court system of issues and cases that are destined to go there anyway.

Model 7 – Direct Access (HRT or Court)

A final model for consideration is one that would combine the features of the Model 3 or Model 4 (direct access to either a judicial or inquisitorial-style HRT) with an option to the complainant to file his or her complaint directly with the Supreme Court (as in Quebec).

Summary

Models 2, 3, 4, 5 and 7 would all require a substantial shift in financial and human resources from the HRC (or human rights advocacy service in Model 5) to the HRT. Additionally, under these models, the HRT's procedural and substantive powers would need to increase substantially.

All of the proposed models contemplate that investigations will be limited to complex or systemic complaints. The models also contemplate greater reliance on the exchange of pleadings to define issues and the provision of information from parties to support the allegations and defences that they wish to put forward. There is also a significant emphasis on early mediation for virtually all cases with attendant safeguards to address any issues of power imbalances. Experience in this

jurisdiction and others (particularly Ontario) has shown that alternative dispute resolution is a much more efficient and constructive process than litigation.

The direct access to HRT models give greater control to complainants over their complaints, although some of the models (e.g., Model 3) would empower the HRC to assume control over individual complaints that give rise to systemic discrimination issues. Direct access would result in a dramatic increase in the work of the HRT and a corresponding increase in the costs associated with legal representation before the HRT if the current legal aid model is retained.

The primary advantages of a permanent HRT over direct access to the courts flow from the fact that the HRT would have a developed and sophisticated expertise in equality and human rights law (guaranteed through detailed statutory appointment powers) and would also have the flexibility and informality associated with an administrative tribunal. That being said, the advantage of expertise could be maintained through the establishment of a special provincial human rights court.

Courts traditionally follow the adversarial form of adjudication. Administrative tribunal structures allow for more flexibility thus permitting more active involvement in managing and mediating cases, and elucidating information about their merits. Conventional wisdom holds that the advancement and enforcement of human rights is more constructively and effectively achieved through education, conciliation and correction, rather than through confrontation and punishment. The relative costs, efficiencies and effectiveness of a court system versus a tribunal system for first instance human rights decisions would have to be examined. On the face of it, there seems no obvious reason to believe that the costs to the public purse to operate a court system would be less, and they might well be more, than an administrative tribunal system.

Finally, the use of judges for adjudicating human rights would raise significant appointment issues. HRT members are usually appointed for three to five year, full or part time terms. In order to meet constitutional requirements of institutional independence and impartiality, judges (including judges of the existing Provincial Court) must have significantly more security of tenure and remuneration.

Key Questions for Consideration

The information contained in this Background Paper leaves for consideration some general and key questions for further consideration and policy development. The broad questions raised are these:

- What role should the HRC play in the human rights process?

- What type of structural model best achieves the goals expressed in the Code as well as the administrative justice goals of efficiency, effectiveness and fairness?
- What statutory mechanisms should be put in place to further the administrative justice goals of efficiency, effectiveness and fairness?
- When, how and to whom should legal representation be provided in human rights proceedings?
- Should the Code contain express definitions for terms or concepts and if so which terms or concepts should be further clarified?

CHAPTER XI: CONCLUSION

As indicated in the Introduction, this background paper is the first phase of the Administrative Justice Project. It is intended to provide a relevant historical and current backdrop, against which will be undertaken further dialogue with stakeholder groups and the public and a further critical examination and assessment of our human rights legislation. The second phase of the project will also have the benefit of other background papers on Workplace Tribunals and Agency Appointments.

Protecting and advancing human rights in our society is a continuing challenge. It is our hope that the history, commentary, feedback, and prospective options for addressing forum/agency overlap and structural service delivery issues which have been presented in this background paper will provide a springboard for positively, fairly and creatively meeting that challenge. In the context of the limited consultation that we undertook, we have had the privilege of receiving input from individuals and groups representing a spectrum of experiences and interests. Their willingness to take the time and effort to contribute invaluable information to this background paper has been appreciated.

It is easy to become trapped in evaluating differences in viewpoint amongst those with whom we were able to consult, and lose sight of the inspiring consensus between them concerning the value and importance to our society of fundamental human rights and proposals for change. It is this consensus which must be built upon in Phase 2 of this project and, ultimately, in the policy choices which will need to be addressed in order to make fundamental human rights objectives which we collectively share truly attainable in our society.

APPENDICES

APPENDIX A

The 1993 Black Report

The scope and findings of the 1993 Black Report were described as follows:

...[It] covers the operation of the system currently in place for protecting human rights in British Columbia. Stage one assesses the ways in which the existing legislative scheme can be made to operate as effectively as possible. It does not examine options that would require amendments to the Human Rights Act. Those options would be covered during a possible second stage of the review.

The introduction to the report describes the background to the system now in place. When the Human Rights Act was passed in 1984, the legislative intent seems to have been to restrict enforcement powers and to minimize expense to government. That law is still in effect. However, subsequent developments reflect a broader concept of human rights protection. For example, the B.C. Council of Human Rights has developed education programs not contemplated by the Act. The fact that the members of the Council serve full-time has made adjudication more effective. Legislative amendments in 1992 moved in a similar direction by expanding grounds of discrimination and the power to deal with systemic discrimination.

The cumulative result is that the enforcement system represents an amalgamation of inconsistent theories. While recent developments hold out the promise of broader and more effective protection, the system is held back by the narrow legislative framework put in place in 1984. In particular, the adjudicative role of the B.C. Council of Human Rights undermines its ability to perform other functions such as advocacy, education and enforcement. Similarly, other activities may affect the impartiality needed for adjudication unless restricted. A second important limitation is that no one has the power or responsibility to represent the public interest in human rights disputes.

The best that can be accomplished under the existing statutory scheme is to try to balance the competing and conflicting obligations imposed on the Council by the legislation. This results in compromises that sometimes make it difficult to achieve full effectiveness. This report is subject to the same constraints, and some of the recommendations represent interim solutions that should be re-examined if a broader legislative review takes place.

The 1993 Black Report presumed that the following assumptions would, at minimum, be important in evaluating human rights processes:

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- the enforcement system must at a minimum be capable of processing in a given year the number of complaints that are filed during this period;
- the system must be fair to all;
- the process should serve the broader policy objective of eradicating patterns of discrimination, as well as a purpose of providing redress to individuals who have suffered discriminatory treatment;
- delay should be minimal;
- the work environment for those enforcing the legislation should be satisfying and productive;
- the costs and administrative burden must be assessed.

At that time, concerns had been raised about the processing of complaints. These included increasing caseload, increasing backlog, lack of funding and resources¹⁹⁵ and lack of staff training. The 1993 Black Report identified the following "significant flaws":

- the inability of the system to deal with complaints of broad systemic discrimination notwithstanding the 1992 amendments to the Act;
- the failure to represent the "public interest" at hearings;
- the inadequacy of legal representation of parties.

Black also concluded that the establishment of a full-time council had facilitated the development of considerable human rights expertise "to a degree that is more difficult for part-time commissioners", a positive development that the author termed "surprising". He made a series of recommendations relating to the processing of complaints (in relation to intake, screening, investigation, mediation, settlement, and hearing adjudication), legal representation of the parties, educational activities and staff training, development and support.

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The Council had no staff of its own, but rather shared investigation officers with other workplace tribunals. These investigation officers had no reporting relationship with the Council and were employees of the Ministry of Labour.

APPENDIX B

1994 Black Report

In accordance with its terms of reference, the 1994 Black Report was the product of wide consultation both within and outside government:

During the spring, several thousand brochures were distributed announcing the Review and inviting participation. A discussion paper was also prepared and distributed. To assist groups to participate in the process, funding was supplied by the Ministry to help cover expenses of preparing submissions. Meetings were held in nineteen communities throughout the Province during May, June and July. These meetings included round-table discussions for human rights groups, labour groups and business groups. In addition, there were evening meetings open to any member of the public.¹⁹⁶

Additionally, Black met informally with a number of groups and sent letters to about 400 persons who had been parties to human rights complaints. His work was also informed by similar studies that had been undertaken in New Brunswick, Ontario and Alberta.

Black's consultations revealed uniform criticism of the delay in processing complaints.¹⁹⁷ At that time, the average length of time to proceed to a hearing before the human rights council was three years. Black wrote:

... People experiencing discrimination said that this delay denies them effective protection. Labour groups said that it increases the costs of litigation and creates an ongoing burden on business activities.

Other identified areas of concern included inequality of access (lack of regional offices), lack of public interest representation in the complaint process, lack of adequate resources (for education,

¹⁹⁶ 1994 Black Report, Introduction, p. 1.

¹⁹⁷ See also, 1994 Black Report, at p. 13: "... At almost every meeting that took place during the consultation phase of the Review, participants pointed out the harm that delays in the system can cause. People who had filed complaints said that the process sometimes takes so long that it was not worth the effort. Business representatives pointed out that a long process is also a costly one. They also noted the emotional burden and uncertainty caused when an allegation is pending for years, particularly when it turns out that the *Human Rights Act* was not violated. Trade unions agreed with all of these points, based on their experience both in representing their members and in defending themselves against complaints".

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research or policy development) and lack of any educational programs.¹⁹⁸ It was considered inappropriate to assign the council an educational role or to require it to represent the public interest in the litigation of human rights complaints because it was an adjudicative body responsible for the impartial adjudication of human rights disputes. Black observed that it was almost impossible for "a single agency to take all the positive steps needed to protect human rights while serving as the tribunal that decides human rights cases".¹⁹⁹

Black determined that the most important objective for a strategy to achieve equality was the correction of persistent or systemic patterns of inequality affecting groups. He reached this conclusion for the following reasons.²⁰⁰

... The most obvious [reason] is that discrimination that has an ongoing effect on a person's life usually causes greater harm to that individual than a single discriminatory event. Discrimination is never pleasant, and even the effects of a single isolated event do not have a major effect on the future life of a person. When inequality is an ongoing condition, it can become one of the central themes of a person's life.

A second reason is that ongoing inequality of groups has broad social consequences. Ongoing disadvantage of a group can contribute to a cycle of poverty that is harder and harder to change over time. Disadvantage also often creates resentment. Whether this resentment is expressed in a form that is blatant or subtle, active or passive, self-destructive or destructive of the interests of others, society at large is affected in many ways, including crime and costs associated with poor health. The lost productivity of those who experience the inequality also affects society.

A third reason is that a remedy which corrects ongoing patterns of inequality has greater benefits than one that simply provides compensation for past discrimination. Correcting an ongoing policy or practice does more than assist those originally subjected to the discrimination. It prevents future discrimination against others, avoiding harm before it occurs. It also avoids future human rights cases arising out of the same policy or practice, saving both the government and the parties involved additional expense.

In short, persistent patterns of discrimination cause the greatest harm both to society and to the people affected. They also have the greatest potential for an effective remedy ...

...

¹⁹⁸ On this point, Black said that "[c]ommunity groups, business and labour all agreed that education material was essential to promote human rights and to inform both people who experience discrimination and those responsible for compliance about the *Human Rights Act* and their rights and responsibilities under the Act.

¹⁹⁹ 1994 Black Report, Executive Summary, p. ii.

²⁰⁰ At pp. 12-12.

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If ... a key objective is to change persistent patterns of inequality, these limitations are often fatal. Barriers to equality affecting large numbers of people may never come to the attention of the B.C. Council of Human Rights because no one has the information necessary to start the complaints process. If a complaint is filed, the investigation may not be sufficiently broad to uncover the barriers and may focus on the individual situation. The hearing will also usually focus on the individual.²⁰¹

Having stated the reasons why identifying and eradicating systemic discrimination should be the primary objective of human rights legislation, Black identified the following secondary objectives:

- redressing discrimination against individuals (regardless of whether that discrimination is associated with broader systemic patterns);
- preventing discrimination through training and education;²⁰²
- monitoring of equality trends and patterns in society;
- providing effective, expeditious remedies through a fair process.

Black also acknowledged the difficulties associated with achieving effectiveness, expeditiousness and fairness at the same time:

If the attempts to achieve fairness lead to an unduly complicated and technical process, the process will be long and not very effective. On the other hand, the desire to eliminate delay may make it tempting to take shortcuts to undermine process. The goal must be to try to find ways to implement each of these objectives without undermining the others.²⁰³

Black observed that the focus of the *Human Rights Act*, which was on processing individual complaints of discrimination and providing individual remedies, had not proven effective in

²⁰¹ As Black observed in a footnote, "Under the Act, the parties at the hearing will be the complainant and the respondent. The B.C. Council of Human Rights cannot appear to present broader issues of public interest because it is a member of the Council who adjudicates. Later in this Report, recommendations are made to modify this system, but experience in other jurisdictions suggests that as long as we rely entirely on a complaints-based system, these modifications will be only a partial solution".

²⁰² See also, Madam Justice Claire L'Heureux-Dubé, *Volatile Times: Balancing Human Rights, Responsibilities and Resources*, 25 C.H.R.R. C/4: "Human rights legislation proceeds on the premise that much discrimination can be eliminated by giving people an opportunity to reassess their attitudes and practices after being made aware of the effects of their conduct. Indeed, discrimination is often unintentional, the result of unquestioned assumptions. Consequently, education, persuasion, and conciliation are the first lines of attack. Resolving complaints in this manner can resolve in considerable saving, compared to the cost of full-blown litigation. More importantly, however, education and persuasion may obtain more satisfactory results than litigation ... However, if persuasion fails, then human rights legislation authorizes tribunals to exercise broad remedial powers to correct or undo the discrimination. Where the discrimination is systemic the tribunal may grant systemic remedies as a preventive measure. These powers are what Walter Tarnopolsky called 'the iron hand in the velvet glove'".

addressing and correcting systemic patterns of inequality.²⁰⁴ He expressed the view that a complaints-based system could not adequately meet the objective of removing systemic barriers by itself. He quoted from Rosalie Abella's Royal Commission Report, *Equality in Employment: A Royal Commission Report* (1984), where the author had observed that "[r]esolving discrimination ... on a case-by-case basis puts human rights commissions in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest".

Black also described the problems associated with legal aid funding for human rights complaints:

This existing system does not work as well as it should. While individual lawyers have provided excellent representation beyond the call of duty, the system does not provide adequate safeguards to ensure that the lawyer will have the necessary knowledge of the field of human rights ...

...

*The legal aid system is especially inadequate in dealing with larger systemic discrimination cases. The system is entirely geared towards dealing with individual cases of discrimination involving relatively straightforward issues. The rules place severe limits on the number of hours that a lawyer can charge for in dealing with a human rights claim. Many of the lawyers and other knowledgeable people consulted during this Review thought that the time allowed was not even adequate to deal with cases of individual discrimination, and it is completely inadequate for preparing for a hearing concerning systemic discrimination.*²⁰⁵

Black recommended the establishment of a Human Rights Law Clinic under the administration of the Legal Services Society. He contemplated that claimants would be provided with lawyers employed at the clinic, by staff lawyers of the Legal Services Society Community Law Offices or by private counsel as may be appropriate to the particular circumstances. Alternatively, he recommended that, like most other jurisdictions, the commissioner for human rights should be given responsibility for representing all claimants.²⁰⁶ The latter arrangements were recognized as having the advantages of in-house expertise and other efficiencies associated with such expertise.

²⁰³ At p. 13.

²⁰⁴ In his 1994 Report (at p. 17), Black observed that "[n]o complaints-based system can adequately meet [the objective of removing systemic barriers] by itself" and quotes the following passage from Rosalie Abella's Royal Commission Report (*Equality in Employment: A Royal Commission Report* (1984)): "Resolving discrimination ... on a case-by-case basis puts human rights commissions in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest".

²⁰⁵ 1994 Black Report, p. 131.

²⁰⁶ A number of groups opposed this because it takes control of the case away from the claimant and places it in the hands of the commission. Their views reflect the recommendations of the La Forest Report.

He also considered the issue of legal representation for respondents:

Legal aid for a respondent must be justified on a somewhat different basis than legal aid for a claimant. It cannot be justified as vindication of a wrong to the community as well as the individual nor as a way to prevent future harm to others. However it can be justified if it is needed to comply with the principles of fairness. Many human rights claims involve issues of law or complex issues of fact. A person without knowledge of this area of law could not effectively present a legal defence concerning those issues. Therefore, it would violate the principles of fairness to require a person to defend themselves at a hearing because they could not afford a lawyer.

Most respondents have the resources to retain a lawyer and would not want to rely on the legal aid system to obtain legal assistance. However, some claims are brought against individuals or small businesses who cannot afford a lawyer. For example, a claim might be filed against a fellow employee, a person renting out a basement suite or a one or two person business. These people should be eligible for legal aid if they meet the normal financial eligibility requirements.²⁰⁷

Black recommended that respondents be eligible for legal aid if they could meet the usual financial criteria and further that all respondents should be informed of the availability of such assistance.

Black determined that structure and resources were the areas most in need of change under the *Human Rights Act*. Additionally, he concluded that procedural changes were needed to speed up the process and substantive changes were needed to fill in gaps in the scope of the Act that denied or limited protection in certain situations. Ultimately, he proposed that the Act be replaced by a new *Human Rights Code* that "would preserve the strengths of the Act, while correcting the weaknesses".²⁰⁸ The 1994 Black Report culminated in a series of recommendations that fell into four broad categories:

- commission structure, roles and responsibilities;
- education and information programs;
- procedures for dealing with human rights claims, e.g. investigation, mediation, settlement and screening of complaints, adjudication procedures and remedies and legal representation;

²⁰⁷ 1994 Black Report, p. 134.

²⁰⁸ 1994 Black Report, Executive Summary.

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- the scope of coverage of the anti-discrimination and remedial provisions, e.g., inclusion of the central elements of discrimination, expansion of prohibited grounds and amendments to the exceptions.²⁰⁹

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Black recommended that the areas of activity covered by the Code should be extended to facilities that might not be considered "public" facilities (e.g., "those that are granted a government permit or licence and play an important role in the life of the community"). He also recommended restoring the "prohibition on pre-employment requests for information that cannot be used for legitimate purposes" and expanding the right of women and men to equal pay for similar or substantially similar work to a right to equal pay for work of equal value: Black Report, Executive Summary. Black also suggested changes to some of the prohibited grounds of discrimination (e.g., discrimination based on family status should be extended to the sale of property; discrimination on the basis of source of income should be extended from the rental of housing to the other areas of activity covered by the Code; discrimination on the basis of sexual orientation should be defined to include relationships). He also recommended changes to the exemption provisions.

APPENDIX C

Summary of Human Rights Legislation in Other Canadian Jurisdictions

Alberta

The Alberta *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, which underwent a substantial revision in 1996, establishes the Alberta Human Rights and Citizenship Commission consisting of members appointed by the lieutenant-governor-in-council. One member is designated as the chief commissioner.

The commission has responsibility for promoting equality and awareness and appreciation for the multicultural heritage of Alberta society, conducting research and developing and conducting educational programs designed to eliminate discriminatory practices, and promoting an understanding of, acceptance of and compliance with the Act.

Any person, except the commission, who has reasonable grounds for believing that a person has contravened the Act, may file a complaint with the commission. Upon receipt of a complaint, the director of the commission must, as soon as is reasonably possible, attempt to effect a settlement firstly by means of a conciliator or secondly through the appointment of an investigator. The director may: (a) dismiss a complaint at any time if he or she considers it is without merit; (b) discontinue the proceeding if the director is of the opinion that the complainant has refused to accept a proposed settlement that is fair and reasonable; or (c) report to the chief commissioner that the parties are unable to reach a settlement. A complainant may appeal a dismissal of the complaint to the chief commissioner.

Where the chief commissioner receives a report from the director that the parties are unable to settle the complaint or where he or she decides that the complaint should not have been dismissed or that the proposed settlement was not fair and reasonable, the chief commissioner shall appoint a human rights panel to deal with the complaint. The panel must be composed of one or more members of the commission, one of whom may be the chief commissioner unless they have been involved in a review of the dismissal decision.

The director has carriage of a complaint before a human rights panel except where the chief commissioner has made a decision that the complaint should have been dismissed and, in such cases, the complainant has carriage of the proceeding. The human rights panel may, at any

stage, direct a special case for the opinion of the Court of Queen's Bench on any question of law arising during the course of the proceeding.

The human rights panel must dismiss a complaint that is without merit. If the panel finds that the complaint has merit in whole or in part, it may order the respondent to do one or more of the following:

- cease the contravention;
- refrain from committing the same or any similar contravention;
- make available the rights, opportunities or privileges that were denied;
- compensate the person for all or any part of wages or income lost or expenses incurred;
- take any other action the panel considers proper to place the complainant in the position he or she would have been in but for the contravention of the Act.

The panel may also make any order as to costs that it considers appropriate. Any party may appeal an order of the panel to the Court of Queen's Bench.

Saskatchewan

The Saskatchewan *Human Rights Code*, S.S. 1979, c. S-24.1, establishes a commission consisting of not fewer than three members appointed by the lieutenant-governor-in-council²¹⁰. One member is designated as the chief commissioner and one member is designated as the deputy chief commissioner. The lieutenant-governor-in-council may also appoint a director of human rights who functions as the chief executive officer and secretary of the commission.

The commission is responsible for the administration of the Code and has a broad mandate to advance equality, promote an understanding and acceptance of, and compliance with the Code, develop and conduct educational programs, promote understanding of the legal rights of residents in the province, and conduct and encourage research in the field of promoting human rights.

Any person who has reasonable grounds for believing that a person has contravened the Code may file a complaint with the commission. The commission may also initiate its own complaints on reasonable grounds. The Code provides that the commission may dismiss a complaint at any time during the course of an inquiry where it is satisfied that the complaint is without merit.

²¹⁰ Bill 77, Saskatchewan Human Rights Amendment Act, 2000, First Session, 24th Leg., Saskatchewan 2000 will establish a permanent tribunal upon proclamation.

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The commission is directed to "inquire into the complaint and endeavour to effect a settlement" of the matter. The complaint is settled only where the commission has agreed to the terms of settlement.

Where the commission is unable to effect a settlement, it must report to the minister and, in its discretion, may direct a formal inquiry into the complaint. In the absence of a direction from the commission, the minister may also direct a formal inquiry into the complaint. The commission has carriage of the complaint before the board of inquiry.

The board of inquiry has authority to dismiss the complaint or, where it finds the complaint to be substantiated, to order the respondent to do any act or thing that constitutes full compliance and to rectify any injury caused to the complainant and make compensation. Where the board finds that a person has willfully and recklessly contravened the Act or the person injured by the contravention has suffered injury to feelings or self-respect, it may order an additional amount of compensation to a maximum of \$5,000.00.

Any party to a proceeding before a board of inquiry may appeal its decision to the Court of Queen's Bench on a question of law. A further appeal lies to the Court of Appeal.

Manitoba

The Manitoba *Human Rights Code*, S.M. 1987-88, c. 45, establishes the Manitoba Human Rights Commission, which is composed of ten members appointed by the lieutenant-governor-in-council. One member is designated as chair to hold office for three years and one member is appointed as vice-chair. The commission is charged with responsibility for promoting equality, disseminating knowledge and promoting understanding of civil and legal rights, developing and promoting educational programs, and other responsibilities conferred on it by the Code.

One of the commission staff or officers is appointed as the executive director who is responsible for, amongst other things, acting as registrar of complaints and directing staff in the investigation and settlement of complaints. The Code also establishes an adjudication panel consisting of at least five persons appointed by the lieutenant-governor-in-council who hold office for three years.

The Code provides that any person may request the commission to provide an advisory opinion on whether an act or omission or proposed act or omission contravenes the Code. The commission has the power to revoke or modify an advisory opinion upon provision of written notice. Where the advisory opinion indicates that the act or omission or proposed act or omission does not contravene the Code, the requester shall conclusively be deemed not to be in contravention of the Code in undertaking the act or omission.

Any person may file a complaint with the commission. The commission itself or the executive director may also file a complaint if there are reasonable grounds to believe that any person has contravened the Code. The legislation provides that, as soon as is reasonably possible after the complaint has been filed, the executive director shall cause the complaint to be "investigated to the extent the Commission regards as sufficient for fairly and properly disposing of it". The commission must dismiss a complaint if it is satisfied that any of the following conditions exist:

- the complaint is frivolous or vexatious;
- the acts or omissions described in the complaint do not contravene the Code; or
- the evidence in support of the complaint is insufficient to substantiate the alleged contravention of the Code.

Where the commission does not dismiss a complaint, it may undertake mediation in an attempt to settle it. Where the complainant rejects an offer of settlement from the respondent that the commission considers to be reasonable, the commission must terminate its proceedings in respect of the complaint.

Where a complaint is not dismissed summarily or settled, and the commission is satisfied that additional proceedings would further the objectives of the Code or assist the commission in discharging its responsibilities under the Code, the commission must request the minister to designate a member of the adjudication panel to adjudicate the complaint or recommend that the minister commence a prosecution for an alleged contravention of the Code.

If a matter proceeds to hearing, the commission has carriage of the complaint. The adjudicator is directed to convene and complete the hearing without undue delay and must render a final decision within sixty days of completion of the hearing or forthwith advise the minister in writing of the reasons for the delay. The adjudicator has broad remedial jurisdiction to order a party:

- to do or refrain from doing anything to secure compliance with the Code;
- to compensate any party adversely affected by the contravention;
- to pay damages for injury to dignity, feelings and self-respect;
- to pay a penalty or exemplary damages for any malice or recklessness involved in the contravention;
- to adopt and implement an affirmative action program or other special program.

The Code directs that parties to an adjudication shall pay their own costs; however, where the adjudicator regards a complaint or reply as frivolous or vexatious, or is satisfied that the investigation or adjudication has been frivolously or vexatiously prolonged by the conduct of any party, the responsible party may be ordered to pay some or all of the costs of any other party affected.

The Code provides that every decision and order made by an adjudicator is final and binding subject to the right to judicial review on limited grounds.

New Brunswick

The New Brunswick *Human Rights Code*, R.S.N.B. 1973, c. H-11, establishes a commission composed of at least three members appointed by the lieutenant-governor-in-council. One member is designated as the chair. The commission is responsible for administration of the Code and has a mandate which includes responsibility for:

- promoting equality;
- promoting an understanding of, acceptance of, and compliance with the Code;
- developing and conducting educational programs designed to eliminate discriminatory practices.

Any person may file a complaint with the commission. The commission, itself or through any person designated to do so, is directed to inquire into the complaint and to endeavour to effect a settlement of the matter. The commission has broad authority to dismiss the complaint at any stage of the proceedings if it forms the opinion that the complaint is "without merit".

If the commission is unable to achieve a settlement, the minister may, on recommendation of the commission, appoint a board of inquiry composed of one or more persons to hold a hearing or refer the matter to the labour and employment board established under the *Labour and Employment Board Act*. In the latter case, the labour and employment board shall be deemed to be a board of inquiry for the purposes of the Code.

The commission has carriage of the complaint before the board of inquiry. The board has broad remedial jurisdiction to dismiss complaints, or to order any party found to have violated the Code to:

- do or refrain from doing any act so as to effect compliance with the Code;

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- rectify any harm caused by the violation;
- restore any party adversely affected by the violation to the position he would have been in but for the violation;
- reinstate any party who has been removed from a position of employment in violation of the Code;
- compensate any party adversely affected in such amount as the board considers just and appropriate;
- compensate any party adversely affected for any consequent emotional suffering in such amount as the board considers just and appropriate.

There is no provision for costs. The decision of the board of inquiry is final subject only to judicial review.

Nova Scotia

The Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, establishes a commission composed of between three and twelve members appointed by the governor-in-council. One member is designated as the chair. The commission is responsible for, among other things, administering and enforcing the Act, developing a program of public information and education in the field of human rights, conducting and encouraging research, and advising and assisting government departments. The governor-in-council also appoints a director of human rights who is the chief executive officer and a member of the commission.

Where a person makes a complaint or the commission has reasonable grounds for believing that a complaint exists, it must instruct the director or some other officer to "inquire into and endeavour to effect a settlement" of the complaint. The commission may, at any stage after the filing of a complaint, appoint a board of inquiry. The commission is a party to the proceeding although it does not have carriage of the complaint. The board of inquiry has authority to order any party who has contravened the Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation. There is no provision for costs. An appeal lies from the board of inquiry to the Supreme Court (Appeal Division) on a question of law.

Prince Edward Island

The Prince Edward Island *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, establishes the commission as a corporation composed of not fewer than three and not more than nine members

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appointed by the Legislative Assembly. One member is designated as the chair of the commission. Each commissioner holds office for a term not exceeding three years but is eligible for re-appointment.

The commission is responsible for, amongst other things, administration and enforcement of the Act, developing a program of public information and education in the field of human rights, and advising the government on suggestions, recommendations and requests made by private organizations and individuals.

Any person, except the commission, who has reasonable grounds for believing that a person has contravened the Act, may make a complaint to the commission. The executive director of the commission must "investigate and attempt to effect settlement" of the complaint. At any time, the executive director may:

- dismiss a complaint if he or she considers that the complaint is without merit;
- discontinue further action if, in his or her opinion, the complainant has refused to accept a proposed settlement that is fair and reasonable;
- discontinue further action if it could be dealt with more appropriately by an alternate method of resolution;
- report to the chair or the commission that the parties are unable to settle the complaint.

If the executive director dismisses the complaint, a complainant may request a review by the chair of the commission.

Where the chair receives a report from the executive director indicating that the parties are unable to settle the complaint or where the chair decides that the complaint should not have been dismissed or that the proposed settlement was not fair and reasonable, the chair shall appoint a human rights panel to deal with the complaint. The panel shall, absent special circumstances, consist of one member of the commission. The executive director is a party to and has carriage of the complaint before the panel except where the chair has exercised the reconsideration power and, in such circumstance, the complainant will have carriage of the proceeding.

A human rights panel may, at any stage, refer a stated case to the Supreme Court (Trial Division) on any question of law arising in the course of the proceedings. The panel has remedial authority to dismiss a complaint or order the person who has contravened the Act to:

- cease the contravention;

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- refrain from committing the same or any similar contravention;
- make available the rights, opportunities or privileges that the complainant was denied;
- compensate the complainant or other person for all or any part of wages or income lost or expenses incurred by reason of the contravention;
- take any other action the panel considers proper to place the complainant or other person in the position the person would have been in but for the contravention.

The panel also has authority to make any other decision as to costs that it considers appropriate. The decision of the panel is final and binding subject only to judicial review.

Newfoundland

The Newfoundland *Human Rights Code*, R.S.N. 1990, c. H-14, establishes a commission composed of at least three members appointed by the lieutenant-governor-in-council. One member is designated as chair and another as vice-chair. Each member is appointed for a term of five years and may be reappointed for a further five-year term.

The Code contemplates the appointment of an executive director to act as a registrar of complaints and to act as the chief executive officer and secretary to the commission. The commission is responsible for, amongst other things, promoting equality and an understanding of, and acceptance of, the Act, distributing information and developing and conducting educational programs, and advising government departments and agencies.

Any person who has reasonable grounds for believing that a person has contravened the Code may file a complaint with the executive director who is charged with responsibility for investigating and trying to settle the matter. Following an investigation, the executive director must provide a report to the commission, which must then determine whether or not to refer the matter to a board of inquiry. Where the commission declines to refer the complaint, the complainant may apply to the Newfoundland Supreme Court for an order directing the commission to make the referral.

Where a complaint is referred to a hearing by the commission or the court, the chair shall refer the matter to the chief adjudicator of the panel appointed to hear the matter. Members of the board of inquiry are appointed by the lieutenant-governor-in-council.

The commission is a party to the proceeding and has carriage of the complaint before the board of inquiry. The board is directed to hear the complaint without undue delay. The board of inquiry

has broad remedial powers to dismiss a complaint or to order the person who contravened the Act to:

- stop the contravention;
- refrain from committing the same or similar contravention in the future;
- make available the rights, opportunities and privileges denied to the complainant;
- provide compensation, including compensation for all or a part of wages or income lost or expenses incurred;
- take whatever other action the board considers appropriate.

The board also has power to "make whatever order as to costs that it considers appropriate". Any party may appeal an order or decision of the board by way of an application to the court. Where the grounds of appeal consist in whole or in part of questions of fact or of mixed law and fact, leave is required.

Nunavut and Northwest Territories

Nunavut and Northwest Territories, which are under federal human rights jurisdiction, also share a *Fair Practices Act*, R.S.N.W.T. 1988, c. F-2. This Act gives the Commissioner in Executive Council discretion to appoint fair practices officers to hold office during good behaviour for a term not exceeding five years.

Any person claiming to be aggrieved by an alleged contravention of the Act may file a complaint with a fair practices officer. Where a complaint is filed, the fair practices officer must inquire into the matter and assist the parties in attempting to settle the matter by agreement. The fair practices officer may refuse to accept a complaint or to continue with the proceeding where, in his or her opinion, the matter is trivial, frivolous, vexatious or has not been initiated in good faith. Where a complainant withdraws a complaint, the fair practices officer may continue the proceeding if, in his or her opinion, proceeding with the complaint would not have an adverse impact on the complainant and it would be in the public interest to do so.

In addition to receiving, investigating and mediating disputes between parties to complaints, the fair practices officer may also investigate allegations of contraventions of the Act or regulations, issue notices and conduct hearings. The fair practices officer may hold a hearing where he or she has inquired into the complaint and formed the opinion that either settlement is unlikely or the urgency of having the complaint resolved requires that a determination be made.

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The fair practices officer is not disqualified from holding a hearing by reason only of the fact of having attempted to assist the parties in settling the complaint or taking part in its investigation. The officer has the authority to make any order or decision that the officer considers just. Any person affected by the order or decision may appeal to the Supreme Court to vary or set it aside.

Yukon

The Yukon Territory *Human Rights Act*, R.S.Y. 1986 (Supp.), c. 11, establishes a commission composed of between three and five members appointed for three-year terms by the Legislature. The commission is charged with responsibility for promoting equality, education and research, promoting settlement of complaints, and causing complaints to be adjudicated. The director of human rights is responsible to the commission for ensuring that complaints are dealt with in accordance with the Act.

Any person believing that he or she has suffered a contravention of the Act may file a complaint with the commission. The commission must investigate the complaint unless the complaint is beyond the jurisdiction of the commission, it is frivolous or vexatious, or the victim requests that the investigation be stopped. Following investigation, the commission must dismiss the complaint, try to settle the complaint or request a board of adjudication to decide the complaint. The panel is composed of at least three adjudicators appointed for three-year terms by the Legislature.

The board of adjudication may order the respondent to stop the discrimination, rectify any condition that causes discrimination, pay damages, exemplary damages and costs. If the board concludes that the complaint was frivolous or vexatious, or that the proceedings were frivolously or vexatiously prolonged, it may order the commission to pay part or all of the respondent's costs of defending against the complaint and damages for injury to the respondent's reputation. The board also has authority to order costs and a damage award against the complainant if it concludes that the complaint was based on information that the complainant knew to be false.

An appeal lies from the decision of the board of adjudication to the Supreme Court on questions of law.

APPENDIX D

Some Views on the Problem of Parallel or Multiple Proceedings

The 1994 Black Report

During the consultation phase of the 1994 Black review, concerns were frequently expressed by employers and trade unions about the overlap in subject matter between grievances and human rights complaints and the ability of a person to simultaneously or consecutively proceed in both forums. Employers typically objected to the costs associated with dual forums, while trade unions frequently referred to examples of where, having advanced a grievance in arbitration proceedings, they were then named as co-respondents with the employer in a subsequent human rights complaint involving the same subject matter.

Several proposals for resolving duplicate proceedings were advanced. Black considered four:

- no restrictions on simultaneous proceedings (the *status quo* under the 1984 Act);
- require employee to elect one process;
- allow proceedings to be initiated in both forums, but defer one pending the disposition of the other; and
- combine the two processes into one.

Of the first, no restrictions on simultaneous proceedings, Black saw the advantages to be: (a) ensuring all human rights and labour relations aspects to be full considered by decision-makers with relevant expertise; and (b) ensuring all of the remedies available under the two governing statutory regimes are available to the employee. Black noted that the disadvantages of allowing grievances and human rights complaints to proceed included the expense, time and uncertainty associated with parallel proceedings dealing with the same subject matter or issues. Black observed that:

In a sense, the status quo presumes that the other proceeding will not adequately deal with human rights issues. That is sometimes true, but it cannot be presumed. While labour arbitrators are not universally knowledgeable about human rights, many of them have considerable human rights expertise. Also, the remedies may be essentially the same in the two proceedings though that will depend on the terms of the collective agreement.

The disadvantages of the status quo are sufficiently serious that it is worth seeking ways to develop new rules that avoid them, or at least mitigate their effect.

Ultimately Black rejected the option of requiring an election by the employee to file either a grievance or a human rights complaint because the employee would not always have: (a) enough information at this stage to make an informed choice;²¹¹ and (b) the full range of remedies available under both processes combined. Black concluded that it would be preferable to permit the employee to file both a grievance and a human rights complaint, but suspend the latter proceeding pending the disposition of the grievance. If the results of the grievance proceedings proved unsatisfactory, the employee could pursue the human rights complaint. In such a case, the human rights complaint:

... would be re-opened, but it would be limited to matters not adequately dealt with in the first proceeding.

... If a human rights claim were filed while a labour grievance was pending, the Director of Investigation and Mediation would have the obligation to consider whether the grievance appeared capable of fully and adequately dealing with the substance of the human rights claim. If it did, the Director would suspend the human rights claim pending the outcome of the grievance process. At the conclusion of the grievance process, the Director would consider whether the grievance had fully and adequately dealt with the human rights claim. If it had, the claim would be dismissed or would be restricted to those aspects not fully and adequately considered during the grievance process.

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On this point, Black writes that "[o]ften the person will have no access to an advisor who is an expert in both grievances and human rights claims. Before any investigation or discussions with the employer, the employee would often have to guess as to the motives for the conduct. For example, an employee might suspect that a dismissal was motivated by the personal animosity of a supervisor unrelated to race. If the employee were forced to give up the opportunity to file a grievance in order to file a human rights claim, he would be denied a remedy for wrongful dismissal. An election also would sometimes require a person to forgo remedies that would be available under the other process. In addition, the claimant does not have full control over either a grievance or a human rights claim, and the process that was selected might go in directions that the employee neither desired nor anticipated. While the disadvantages of parallel proceedings are substantial, requiring an election at the beginning of the process does not seem to be a just solution. The legitimate interests of employers would be protected by means that would cause undue harm to both the interests of employees and the purposes of the *Human Rights Code*." Andrea Zwack, in her article, *Some Issues in the Interaction of Human Rights and Labour Law Processes* (C.L.E., Human Rights '97) responds that "at least some of these concerns could be dealt with by ensuring that employees have a period of time in which to consult with advisors (such as union representatives or advisors at the Human Rights Commission) prior to making their election. For example, the [collective agreement] provisions attacked in the *Hills* case provided the grievor/complainant with 45 days after the commencement of both proceedings in which to determine whether he or she wished to pursue the grievance or the human rights complaint. Further, it would be made clear that it is only to the extent that the grievance is based on allegations of discrimination that a choice of forum must be made. That is, any aspects of the grievance which do not depend on an adjudication of discrimination issues would proceed regardless of the election on the discrimination portion".

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Black also recommended the HRT be given power to dismiss a complaint, defer its hearing or limit its scope to matters "not fully and expertly dealt with in the grievance". The focus of the HRT's inquiry would be on an assessment of whether the grievance process was "suitable for dealing with the human rights issues":

... the Tribunal could examine the entire grievance process in determining whether it had dealt with all matters raised in the human rights claim in a manner reflecting expertise about human rights. After the grievance had been completed, the Tribunal would determine whether to proceed with the full claim, to dismiss it or to limit its scope.²¹²

Black also referred to the possibility of combining labour arbitration and human rights proceedings in some way (i.e., empowering the HRT to appoint the labour arbitrator effectively as a member of the HRT to adjudicate the human rights complaint). While indicating that it was an option deserving of further consideration, he confirmed it was outside the scope of his inquiry.

Another point was made by Black²¹³ that is relevant to any consideration of this issue:

... Earlier, it was suggested that the Human Rights Code should not require an employee to choose between a grievance and a human rights claim at the outset. The courts have held that it is not possible to try to exempt activity from human rights legislation by private agreement; the legislation supercedes all private agreements²¹⁴. However, some terms of collective agreements provide that a member is deemed to have waived a right to make a grievance by taking other steps to deal with a dispute. The result is that the member elects to forego a grievance by filing a human rights claim.

²¹²

Black elaborated on this idea: "If a claim is deferred by either the Director of Investigation or the Tribunal, there should be a time limit on the deferral. It is proposed that the time limit be similar to that which would apply to the Director and somewhat shorter than would apply to the Tribunal, since a grievance should be well underway before the claim reaches the Tribunal. Regulations could change these time limits if experience demonstrated that they were not achieving their objective. Instead of deferring a human rights claim, it would, of course be possible to solve the duplication by deferring the grievance. If the union and the employer decide to defer the grievance, the human rights claim would proceed, since it would be obvious that the grievance would not adequately deal with the human rights aspects of the dispute within the specified time limits. The result is not entirely satisfactory, since an employee who files both a grievance and a human rights claim does not have a right to participate in the decision, though in practice the employee would usually be consulted. The ideal solution would be to enact complementary amendments to the *Labour Relations Code* and the *Human Rights Code* to provide the employee with the right to participate. That is a matter partially outside the mandate of this Review. In the meantime, the Director of Investigation and Mediation should make it a practice to consult with the claimant, the union and the employer before making any decision to defer a claim. Similarly, the Tribunal should invite the claimant, union and employer to make submissions regarding a proposed deferral of the hearing."

²¹³

1994 Black Report, p. 151.

²¹⁴

See *Winnipeg School District v. Craton*, [1985] 2 S.C.R. 150 at 151 and *Ontario Human Rights Commission v. The Borough of Etobicoke*, [1982] 1 S.C.R. 202 at 213.

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Such an election should not be forced on an employee for reasons discussed earlier. It is contrary to the purposes of both the Human Rights Code and the Labour Relations Code to force a person to choose between their statutory rights under the two statutes.

Black was opposed to the idea of deferring a human rights complaint pending the disposition of an employer's internal anti-discrimination policy and procedures because the latter process is not statutorily-based and would not generally afford the same comprehensive range of remedies as those available under the Code. However, he felt the HRT should be empowered to dismiss a complaint if it was satisfied: (a) the process was comparable to the human rights process; (b) the range of remedies was comparable to Code remedies; and (c) the process was carried out by people "with the required expertise and independence". Black believed the criteria for dismissal in such circumstances should be "stringent" and should only permit dismissal or deferral "if, in all respects, the process was comparable to a claim under the *Human Rights Code*".

The 1995 Ontario LRC Report

The Ontario LRC Report advanced a series of recommendations for structural reform to reduce the number of multiple workplace proceedings:²¹⁵

Amendments should be made to each of the legislative enactments subject to this report to provide that the administrative tribunals under each statute have the power to interpret and apply the requirements of human rights legislation and other employment-related statutes, even though these statutes are not the ones regulating the tribunal in question.

In interpreting and applying external law, each administrative tribunal subject to this report should comply with the following principles in compensating a wronged complainant:

- (a) A wronged complainant should be entitled to the variety of remedies contained in the various enactments being applied to the dispute.*
- (b) In situations where two applicable statutes provide the same remedy (for example, monetary compensation for a wrong), the complainant should be entitled to take advantage of the legislation that provides the most advantageous remedy.*
- (c) In no case should a complainant be compensated twice for the same harm.*

Amendments should be made to each legislative enactment subject to this report giving the administrative tribunals in each of these regimes (except grievance arbitrators) the express authority to interpret and apply external law without the assistance of another tribunal in those

²¹⁵ Ontario LRC Report, pp. 163-4.

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circumstances where the tribunal member appointed to hear the dispute has received a cross-appointment to the tribunal that has primary jurisdiction over the law that the tribunal member intends to interpret and apply.

To ensure that each adjudicator is competent to interpret and apply external law, a scheme of training, testing and certification should be established in each administrative tribunal subject to this report.

Amendments should be made to each of the legislative enactments subject to this report giving the administrative tribunals in each of these regimes (including grievance arbitrators) the following powers:

- (a) the authority to hold consolidated hearings;
- (b) the authority to obtain a legal opinion from any other tribunal on any matter within the jurisdiction of that other tribunal, either through expert evidence or by requesting that opinion in writing, and to apply the opinion to the dispute before it; and
- (c) the authority to make determinations of fact for any other tribunal and to request that other tribunal to render a decision, with regard to matters within its authority, as to the legal consequences of those facts.

The registrar of each administrative regime subject to this report should be given authority to transfer a dispute from one regime to another, whenever it has been determined that the law governing the other regime will be the primary focus in the dispute, and the registrar should be given authority to arrange a consolidated hearing when it has been determined that such a hearing will most expediently and fairly resolve the dispute.

Each legislative enactment subject to this report should be amended to expressly include a privative clause to express the Legislature's intention that a tribunal's decision should be final and not reviewable by the courts even where the tribunal has exercised its jurisdiction to refer to external law.

The Ontario LRC also recommended legislative amendments that would require tribunals to defer to the decision of another tribunal in respect of an interpretation question involving an external statute and would require decision-makers to have expertise in relation to all of the administrative regimes involved.

The 2001 La Forest Report

The La Forest Panel considered and rejected the recommendations of the Ontario LRC, in part because of concerns that other tribunals would not have the necessary expertise to adjudicate human rights issues. Similarly, the La Forest Panel rejected the idea of giving a single decision-maker power to deal with labour relations and human rights matters:

... This appears to be the intent of the recent amendments to the Canada Labour Code. Our concern with this approach is one of institutional expertise. We understand that a great deal of human rights cases are decided by labour arbitrators, and to a lesser extent, decision-makers in other processes. Nothing currently guarantees that the arbitrators have the required training for interpreting the Act. In some cases, some of these arbitrators have been appointed to human rights boards of inquiries and the Tribunal. The system of choosing arbitrators by employers and unions does not guarantee that the public interest in human rights issues will be taken into account in this process. Further, we are again concerned with the fact that the process of resolution of disputes in labour relations are in the hands of the employers and the unions, which leaves the employee who is a victim of discrimination at the mercy of interests of these two other parties, since he or she does not control the process.

The La Forest Panel concluded that, as a highly specialized, expert tribunal, the human rights tribunal should have primary and oversight jurisdiction over all human rights issues. Where an individual has more than one forum for pursuing a claim of discrimination, the human rights process should be deferred pending exhaustion of the other available process or processes. The tribunal's oversight role would enable it to proceed with a complaint if the "original" decision-maker did not deal with the human rights issues "adequately and completely". The La Forest Panel believed this scheme would provide an incentive to employers, unions and service-providers to ensure: (a) a claimant is fully informed about the forum (and remedy) choices available; and (b) "knowledgeable decision-makers [are] chosen in the case of arbitration, and that all of the discrimination issues, including systemic issues, [are] fully placed before a decision-maker entitled to decide all the appropriate issues and to provide the appropriate remedies".²¹⁶

The La Forest Panel also recommended that where the employer (or service-provider) can demonstrate it has an effective internal responsibility system in place for resolution of complaints, the tribunal should have power to dismiss a complaint unless the internal system failed to fully deal with the human rights issues or failed to provide an adequate remedy. The reference to an "adequate" remedy suggests the remedy need not be the same or even substantially the same as a remedy otherwise available under the human rights legislation.

²¹⁶

Ultimately the La Forest Panel made the following recommendations: "[100] We recommend that the Act provide that the Tribunal defer a claim filed with it until the human rights issue in dispute is resolved in another dispute resolution process where another process is available and able to resolve the human rights dispute and can provide an appropriate and adequate remedy. Otherwise, claims should proceed without delay" and "[101] We recommend that the Act provide that the Tribunal may dismiss a case that has been the subject of another competent dispute resolution proceeding that has fully dealt with and has provided an adequate remedy on the human rights issues raised by the case. The Tribunal should report on the number of claims that it has deferred and dismissed and on research concerning the capacity of other decision-makers to decide human rights cases."

APPENDIX E

Parallel or Multiple Proceedings – Legislative Measures in Other Canadian Jurisdictions

Legislative measures to avoid potential duplication in the adjudication of human rights issues are in place in other Canadian jurisdictions. For example, ss. 41 and 42 of the *Canadian Human Rights Act* provide in part:

Commission to deal with complaint

41(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

- (a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;
- (b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act ...

Commission may decline to deal with complaint

41(2) The Commission may decline to deal with a complaint referred to in paragraph 10(a) in respect of an employer where it is of the opinion that the matter has been adequately dealt with in the employer's employment equity plan prepared pursuant to section 10 of the *Employment Equity Act*.

Meaning of "employer"

41(3) In this section, "employer" means a person who or organization that discharges the obligations of an employer under the *Employment Equity Act*.

Attributing fault for delay

42(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(1) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another.

Similarly, the *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, confers authority on the executive director of the commission, at any time, to "discontinue further action on the complaint if it could be dealt with more appropriately by an alternate method of resolution under any other Act, or if grievance or other review procedures have not been exhausted".²¹⁷ Under the *Human Rights Code*, R.S.O. 1990, c. H. 19, the Ontario commission may, in its discretion, dismiss a complaint if

²¹⁷ *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 22(4)(c).

it is "one that could or should be more appropriately dealt with under an Act other than this Act". In Quebec, s. 77 of the *Charter of Human Rights and Freedoms*, L.R.Q. c. C-12 provides in part:

Grounds for refusal

77 The commission shall refuse or cease to act in favour of the victim where ...
(2) the victim or the complainant has, on the basis of the same facts, pursued one of the remedies provided in sections 49 and 80 ...

The commission may refuse or cease to act in favour of the victim where ...

(4) the victim or the complainant has, on the basis of the same facts, personally pursued a remedy other than those provided for in sections 49 and 80 ...

Sections 49, 49.1 and 80 in turn provide:

Recourse of victim for unlawful interference

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

49.1. Any complaint, dispute or remedy the subject-matter of which is covered by the *Pay Equity Act* (1996), chapter 43, shall be dealt with exclusively in accordance with the provisions of that Act.

Moreover, any question concerning pay equity between a predominantly female job class and a predominantly male job class in an enterprise employing fewer than 10 employees shall be settled by the Commission de l'équité salariale in accordance with section of this Charter.

Application to a tribunal

80. Where the parties will not agree to negotiation of a settlement or to arbitration of the dispute or where the proposal of the commission has not been implemented to its satisfaction within the allotted time, the commission may apply to a tribunal to obtain, where consistent with the public interest, any appropriate measure against the person at fault or to demand, in favour of the victim, any measure of redress it considers appropriate at that time.

Finally, s. 27.1(d)(d) of the Saskatchewan *Human Rights Code* provides that the chief commissioner or designate may dismiss a complaint where he or she is of the opinion that "the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding".²¹⁸ The chief commissioner or designate also has the discretion to defer further

²¹⁸ "Proceeding" is defined to include "a proceeding authorized by another Act, a civil proceeding or a grievance under a collective agreement".

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action in respect of a complaint if another proceeding is considered more appropriate having regard to the nature of the allegations and remedies available in that proceeding.